In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 199

EARL R. DEEN,

Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals of Texas, Eleventh Supreme Judicial District at Eastland

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Civil Appeals of Texas, Eleventh Supreme Judicial District, at Eastland (R. 177-191), is reported in 275 S. W. 2d 529.

JURISDICTION

1. Jurisdiction is sustained by Title 28 U. S. C. A., section 1257, sub-section (3) (June 25, 1948, c. 646, 62 Stat. 929).

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2. The Statutes of the United States applied by the Court of Civil Appeals of Texas are 45 U. S. C. A., sections 51-59 (35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404).

3. The judgment of the Court of Civil Appeals of Texas was rendered February 4, 1955 (R. 191). Application for writ of error to the Supreme Court of Texas was refused, no reversible error, June 29, 1955 (R. 230), and motion for rehearing of application was overruled April 25, 1956 (R. 239). The Court of Civil Appeals is the highest court of the state in which a decision could be had within the meaning of 28 U. S. C. A., section 1257 (C. 646, 62 Stat. 929). *Michigan-Wisconsin Pipe Line Co. v. Calvert, U. S. Tex., 1954, 347 U. S. 157, 74 S. Ct. 396, 98 L. Ed. 583, rehearing denied.*

4. On June 25, 1956, petition for writ of certiorari was filed and was granted October 8, 1956 (R. 239).

STATUTE INVOLVED

The *Federal Employers' Liability Act (35 Stat. 65; 45 U. S. C. A., Sec. 51)* provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or hus-

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band and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

Respondent, Gulf, Colorado and Santa Fe Railway Company, states in its Reply to the Petition for Certiorari:

> "While there is no issue but that this action was brought under The Federal Employers' Liability Act, by a railway employee engaged in interstate commerce, against an employer engaged in interstate commerce, that admission does not create either jurisdiction or grounds for this court exercising its discretion in granting certiorari." (Respondent's Reply to Petition for Certiorari, p. 5.)

QUESTIONS PRESENTED

By Petitioner:

The question presented is whether the Court of Civil Appeals of Texas in sustaining all issues found by a jury in favor of the railway, respondent herein, and in disre-

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garding all issues found by a jury in favor of the injured employee, petitioner herein, and by reading into a verdict something that is not there, and in setting aside a judgment of a trial court, rendered in favor of the injured employee on the verdict of the jury, has deprived the injured employee of the right of trial by jury given him by the Congress under a Federal Statute generally known as the Federal Employers' Liability Act.

By Respondent:

In Respondent's Reply to Petition for Certiorari, it nowhere formally sets out Questions Presented from its point of view. From its reply as a whole the following appears to be the question from the point of view of the Respondent:

The petitioner was not deprived of any jury trial; he received a jury trial, and the jury found against him on essential issues.

STATEMENT

Petitioner was a coppersmith working in the shops of Respondent, Gulf, Colorado and Santa Fe Railway Company, at Brownwood, Texas (R. 11). On July 12, 1949, in the course of his employment, he was partially permanently disabled by having his right leg struck and trapped by solidified babbitt, weighing 650 to 700 pounds, which sloughed very suddenly out of a steel pot weighing 250 pounds, which he and a fellow-employee were tilting towards them for the purpose of overturning and emptying out the babbitt (R. 11, 18, 19, 40).

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Petitioner, Deen, pled, among other things, that his injuries proximately resulted from the negligent acts, jointly and severally, of the Respondent, in failing:

(1) to furnish proper tools to remove the babbitt, and

(2) to furnish at least two additional men to assist in removing the babbitt (R. 4).

Respondent, Gulf, Colorado and Santa Fe Railway Company, pled, among other things, that it was not guilty of negligence but if there were any negligence "it was the plaintiff's negligence and proximately contributed to his alleged injuries" (R. 8).

The trial court considered the pleadings and the evidence, particularly in view of the railway company's offering no evidence, sufficient to justify the submission of certain special issues to the jury (R. 151-156). The findings of the jury in response to these special issues may be summarized as follows:

(1) that the railroad failed to furnish Deen proper tools to remove the babbitt from the melting pot, that such failure was negligence, and was a proximate cause of his injuries;

(2) that the railroad did not fail to furnish one or more additional men, other than Snow, to assist plaintiff in removing babbitt from the pot;

(3) that the railroad did not fail to give to plaintiff proper supervision at the time and on the occasion in question;

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(4) that Deen was negligent in failing to obtain additional help and this was a proximate cause of his injuries;

(5) that Deen was not negligent in the manner and method that he used in doing the work;

(6) that the railway company could reasonably anticipate that Deen would do the job in the way and manner that he did;

(7) that the sole proximate cause of Deen's injuries was not due to his own acts and conduct;

(8) that $39,000.00 will reasonably compensate Deen for his injuries, and

(9) that Deen's own negligence should reduce the recovery $17,550.00 or 45% (R. 151-154).

The trial court reconciled the findings of the jury and allowed Deen a recovery in the sum of $21,450.00 (reducing Deen's damages in the sum of $39,000.00 by $17,550.00, as found by the jury, because of his contributory negligence) with interest thereon at the rate of 6% per annum from April 26, 1954, and all costs of court, which is the only judgment that could be rendered without disregarding any of the findings of the jury (R. 150-157). The Texas Court of Civil Appeals set aside the verdict of the jury and the judgment of the trial court rendered thereon, and rendered judgment that the plaintiff, Deen, recover nothing. *(Opinion, Gulf, Colorado & Santa Fe Railway Company v. Earl R. Deen, 275 S. W. 2d 529* (R. 177-191).

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Not only the pleadings but also the evidence support the above jury findings. Deen had worked as a coppersmith about eleven years prior to July 12, 1949, the date of his injury (R. 11). On that day a locomotive was in the shops for repair (R. 13). The assistant foreman, Mr. Williams, told him: "I have got to have this engine today" (R. 13). Babbitt, an alloy of antimony, copper and tin, was necessary for these repairs (R. 15). The babbitt available was in a cracked pot on the furnace that leaked so badly the molten metal would put out the fire underneath (R. 15). Shortly after the assistant foreman, Williams, told Deen the locomotive had to be out that day, W. J. Bettis, clerk to the general foreman, Johnson, told Deen in the presence of Mr. Johnson that his new babbitt pot had arrived at the freight depot, that men from the store department had gone for it and if he had the old one off the furnace the men on arrival could assist him with the new one (R. 14, 76). The old pot weighed 250 pounds and contained solidified babbitt weighing 650 to 700 pounds (R. 18). Deen attempted to get the old pot off the furnace alone and to get the babbitt out of the old pot so that he would have everything ready for the new pot and be ready to do his part in melting the babbitt for use on the engine as soon as possible (R. 18). A crane on a pole affixed to the concrete floor with a hoist was right beside the furnace for lifting heavy objects (R. 14). The 250-pound steel pot, about a yard long, ⅔ of a yard wide, and ⅓ of a yard deep (R. 17), containing 650 to 700 pounds of babbitt, a total weight of almost half a ton, fitted so snugly in the furnace

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that it was necessary to pry its 1½ to 2-inch rim (R. 19), off the brick furnace a height of about an inch (R. 14) so as to allow the arms of the crane to grip it and lift it from the furnace (R. 14-15). A buggy bar or pinch bar was used by Deen to pry the pot and babbitt off the furnace so it could be gripped by an available crane (R. 14). Deen did this work alone and in the process the pot and babbitt crashed to the concrete floor (R. 15). Chance thus selected the spot on the floor where the heavy pot, with its heavier contents, was placed, although Deen testified it dropped just about where he would have set it down (R. 49). It fell upright and Deen decided that since babbitt on cooling contracts more than steel, if he could turn the pot over, the babbitt would fall out and be available for the new pot on its briefly anticipated arrival (R. 18). He struggled alone to overturn the pot but was unsuccessful (R. 18). Earl Snow, a fellow-employee, working as an acting blacksmith in the shop nearby, saw Deen's struggle and voluntarily came to his aid (R. 18, 19). The two tried to overturn the pot away from them but were not strong enough to do so (R. 18). Deen braced himself on the furnace (which was crowded close to the pot) and Snow on the work bench, and, by pulling the pot towards them, they were able to raise it slowly to an upright position (R. 19), when the babbitt sloughed out of the pot (R. 19) very fast (R. 97). The babbitt struck the right leg of Deen (R. 19), crippling him for life (R. 40). The customary method of handling the extraction of solidified babbitt from the steel pot had been to lift the pot and the babbitt off the furnace with the

crane, as Deen did, place it on the floor, release the arms of the crane, get five or six men to come and turn the pot over manually, empty out the contracted babbitt, and then again attach the arms of the crane and hoist the pot back on the furnace (R. 52, 71, 103, 104).

It was petitioner's position in the trial and the appellate courts that the pot should be so equipped with clamps that it could be gripped by the arms of an available crane which was used to lift it off the furnace so that it could be overturned on the floor and its contents emptied (R. 71). The petitioner, who worked with the pot, day in and day out, said this should have been done (R. 71). Earl Snow, a fellow-employee and acting blacksmith, testified the pot was not equipped to be handled with the hoist (R. 89). He testified I-bolts could be fixed in the pot to fasten the hoist to and that he could have made such attachments in the blacksmith shop (R. 89). Deen, the petitioner, testified that if the crane could have gripped the pot, he could have tilted the pot and contents over with one finger and that he could have tilted the pot away from him so that the babbitt would have fallen on the floor and not on him (R. 71). In lifting the pot and contents with the crane from the furnace, it had slipped and fallen from the hoist (R. 15). The foreman and assistant foreman, on a number of times, knew the pot was being lifted off the furnace and the contents emptied, and they had not made any attempt, or said anything about making a tool to handle it (R. 71). Anderson, a witness called by the plaintiff, said the avail-

able tools were not adequate to overturn the pot and dump the babbitt (R. 103).

The railway company offered no evidence at all.

SUMMARY OF ARGUMENT

In the petition for writ of certiorari and the reply thereto, issue was solely joined on the question whether petitioner or respondent was entitled to judgment on the jury findings. The findings clearly indicate an intention on the part of the jury to find in favor of the petitioner, Deen (R. 151-156). The trial court gave effect to all findings of the jury and rendered judgment in favor of petitioner (R. 150-157). The Court of Civil Appeals of Texas set this judgment aside and rendered judgment for respondent, which the Court of Civil Appeals was able to do only by disregarding some of the findings of the jury (R. 150-157). Judgment rendered by the trial court was correct (R. 150-157).

The sufficiency of the pleadings and the evidence to support all the findings of the jury is a matter that may be raised by respondent or even by the Honorable Supreme Court in the absence of any cross-appeal. Petitioner's pleadings, liberally construed, amount to a pleading that the failure of the railway company to furnish proper tools and adequate help were joint and several acts of negligence which were each a proximate cause of petitioner's injuries (R. 4). The trial court submitted the case to the jury on that theory and the trial court rendered judgment in favor of petitioner on that theory (R. 150-157).

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The jury found in favor of the railway on issues as to whether the railway failed to furnish adequate help, whether Deen was negligent in his failure to use available help and whether this was a proximate cause of his injuries (R. 151, 153). Both sides in this Court concede the evidence on these issues was conflicting and cannot be disturbed by an appellate court.

It is likewise Deen's contention that all issues answered in his favor were also supported by the evidence. It is not true, as the Court of Civil Appeals found, that all issues answered in favor of the railway were supported by the evidence while all issues answered in favor of Deen were not supported by the evidence (R. 177-192). It was Deen's contention that the steel pot should be so equipped with clamps that the crane that hoisted it on and off the furnace could overturn it and empty out its solidified metal contents when it reached the floor (R. 71). If an available machine could be used to overturn the steel pot to empty out its contents, railway employees would not be exposed to danger of the babbitt's suddenly sloughing out of the pot and falling on a foot or leg, as happened to Deen (R. 71). Deen said clamps should be provided (R. 71). Snow, a fellow-employee and acting blacksmith for the railway, said clamps should be so provided and he could make them in his shop (R. 89). Anderson, a fellow-employee, said the available tools were not adequate to overturn the pot and empty out the babbitt (R. 103). The proposed method was so simple and practical a Court should take judicial knowledge thereof even in the absence of evidence. If the railway

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company knew of any scientific or practical reason that this type of tool should not be provided, it did not make such information available to the jury because the railway company offered no evidence at all.

Similar types of tools suggested by uneducated, but practical, experienced and trained railway employees had been previously held sufficient to support a jury verdict in a Master and Servant case on almost identical facts by the Court of Civil Appeals of Texas, and such holding was approved by the Supreme Court of Texas.

> *Galveston, H. & S. A. Ry. Co. v. Brewer (1928) (Court of Civil Appeals, Galveston, writ of error refused by the Supreme Court of Texas), 4 S. W. 2d 320.*

The Court of Civil Appeals of Texas, in the *Deen* case, in holding that the verdict of the jury and the undisputed evidence established the railway company provided Deen a safe way to do his job and that if he elected to do his job in an unsafe way, when a safe way was open to him, he could not recover, has read into the jury's verdict something that is not there and has construed the evidence more favorably to the railway company than the company construed it, itself, in the trial court (R. 130).

In attempting to uphold such an erroneous holding of the Court of Civil Appeals of Texas, the Supreme Court of Texas reasoned itself into an anomalous situation where, in the same opinion, in discussing the *Ross* case and the *Deen* case, it reached opposite conclusions on identical

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facts. (See *Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220,* and comparison of the two cases on pages 26 to 29 of this Brief.)

Even if the jury had found the railway had provided Deen a safe way to do the job, which it did not, such finding would not defeat Deen's recovery, if the railway was also guilty of negligence which contributed to his injury [*Clyde Wilkerson v. Wilson McCarthy and Henry Swan, as Trustees of Denver & Rio Grande Western R. Co., Utah 1949, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 reh. den. 336 U. S. 940, 93 L. Ed. 1098, 69 S. Ct. 744; Virginian Ry. Co. v. Viars (1952) (4th Circuit) 193 F. 2d 547, 550.*]

The petitioner was entitled to judgment on the jury's findings under the decisions of the Honorable Supreme Court of the United States as well as decisions of the appellate courts of Texas.

ARGUMENT

On page 27 of this Brief, the findings of the jury in response to special issues submitted to it, in accordance with the Texas practice, are set out. Petitioner and respondent both say they are entitled to judgment on these findings. The trial court agreed with petitioner and rendered judgment in his favor (R. 150-157). The Court of Civil Appeals of Texas said the trial court erred in rendering judgment in favor of petitioner and reversed that judgment and rendered judgment in favor of respondent and that petitioner recover nothing (R. 191-192). The

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Supreme Court of Texas refused application for writ of error (R. 230-231) and indicated its approval of the judgment of the Court of Civil Appeals by obiter dicta in another case, discussing the *Deen* case, decided about the same time, styled

Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220.

Issue is thus squarely joined as to whether the jury findings entitle petitioner or respondent to judgment. That is the only issue on which petition for writ of certiorari was resisted (Reply to Petition for Certiorari, p. 11). The intent of the jury from the findings (R. 151-154) is clear. The jury said the railroad was negligent in not furnishing proper tools and that such negligence was a proximate cause of Deen's injury (R. 151). The jury said the railroad did not fail to furnish additional men to assist Deen in removing the babbitt from the pot, that Deen was negligent in failing to obtain additional help and this was a proximate cause of his injuries (R. 151, 153). What is clearer than that the jury was finding the railroad guilty of negligence and Deen of contributory negligence? The intent of the jury becomes even clearer when the other findings are considered: Deen was not negligent in the manner and method he used in doing the work, the railway company could reasonably anticipate that Deen would do the job in the way and manner he did, the sole proximate cause of Deen's injuries was not due to his own acts and conduct, $39,000.00 will reasonably compensate Deen for his in-

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juries, and Deen's own negligence should reduce the recovery $17,550.00 or 45% (R. 153, 154, 156). The jury does not say Deen's negligence was the sole proximate cause of his injuries and that Deen's negligence should reduce his recovery 100%, as the Court of Civil Appeals says, for it (R. 189-190). The jury did not say, and was not given an opportunity to say, that Deen was provided a safe way to do his job (R. 151-156). The Court of Civil Appeals fudged when it said:

> "We think said answers, considered in connection with the record, must be construed as a finding that sufficient men were available to help Deen remove the babbitt with safety." (R. 181.)

The judgment of the trial court gives sense and effect to all the findings of the jury. The judgment of the Court of Civil Appeals gives sense and effect to all findings of the jury in favor of the railway company, but disregards all findings of the jury in favor of the injured workman. Apparently, the Court of Civil Appeals subscribed to the theory that the constitutional tribunal functioned properly only when making findings of fact in favor of the railroad.

The sufficiency of petitioner's pleadings and evidence to support the jury's findings made in his favor was not questioned by respondent in its reply to petitioner's application for writ of certiorari (Reply, p. 11). Since the Honorable Court of Civil Appeals experienced great difficulty in finding any pleadings or evidence supporting any jury findings in favor of Deen, but no difficulty in finding ample pleadings and evidence supporting all jury findings in favor of

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the railroad, and since respondent may raise such questions in this Court, even in the absence of a cross-appeal [*Langnes v. Green (Wash. 1931), 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520; Walling v. General Industries Co. (1947), 330 U. S. 545, 67 S. Ct. 883, 91 L. Ed. 1088*], petitioner will discuss such sufficiency. Great liberality in pleading is permitted in Texas. Inconsistent causes of action and defenses may be pled. Pleadings, though at all times liberally construed *(33 Tex. Jur., sec. 10, p. 420)*, are even more liberally construed after verdict of the jury *(33 Tex. Jur., sec. 182, p. 636)*. The Court of Civil Appeals seized upon certain clauses of Deen's petition to hold that since petitioner pled improper tools or inadequate help in the alternative, the burden was on him to prove both acts of negligence to prevail (R. 181, 190). The Court attempts to bolster this fallacious position by saying the case was submitted to the jury on that theory (R. 190). While Deen, in parts of his petition, appears to plead improper tools or inadequate help in the alternative, in another part he says clearly and definitely that his injuries were the direct and proximate result, jointly and severally, of the negligent acts of the defendant in the following respects:

(1) not furnishing plaintiff with proper tools;

(2) not furnishing at least two additional men to assist plaintiff in removing the babbitt from the pot (R. 4).

No special exceptions to plaintiff's petition were urged by the defendant in the trial court on the ground that it was

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ambiguous or inconsistent (R. 6-7). Contrary to what the Court of Civil Appeals of Texas says, the case was not submitted to the jury on the theory that the railroad need only to prove the furnishing of proper tools or adequate help to prevail (R. 151-156). If this had been so the trial court would have instructed the jury that if it answered the issue on the failure to furnish proper tools in the negative, then it need not answer the issue on the failure to furnish adequate help. It will be noted that throughout the charge when a subsequent issue became immaterial because of a previous answer, the jury was instructed not to answer the subsequent issue (R. 151-156). Since the trial court rendered judgment for Deen, the Court of Civil Appeals has presumed that the trial court submitted the case to the jury on one theory and rendered judgment on another, when it is the duty of the Court of Civil Appeals to make an exactly opposite presumption.

It is very interesting to note the Court of Civil Appeals found Deen's negligence in failing to use additional help as the sole proximate cause of his injuries (R. 191) despite the fact that the jury expressly found that the sole proximate cause of plaintiff's injuries was not due to his own acts and conduct (R. 154), and despite the fact that the railway company only pled Deen's failure to obtain additional help as contributory negligence (R. 8).

The evidence, as well as the pleadings, amply supports all findings of the jury. Petitioner believes the jury was in error in finding that the railway company did not fail to

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furnish Deen adequate help and Deen's failure to use such help was negligence and a proximate cause of his injuries (R. 151, 153). The statement of the general foreman's clerk, Bettis, made, in the presence of the general foreman Johnson, to Deen, that if he had the old pot off the furnace the men who brought the new one could assist him in placing it, certainly indicates help was limited (R. 14). It is also contrary to human nature that a servant is so eager about his master's business that he will struggle first alone and then with the assistance of a volunteer to overturn a steel pot and contents weighing almost half a ton, when adequate help is available. However, petitioner does not subscribe to the theory that he is only bound by the findings of the jury that are in his favor. Since both sides accept the findings of the jury that the railway company furnished adequate help and that Deen was negligent in not using such help and this was a proximate cause of his negligence, a summary of the evidence on these points is unnecessary.

The evidence which petitioner has set out in his statement fully justifies the submission to the jury of the negligence and proximate cause issues based on the railway company's failure to furnish proper tools. Deen's position was this: that the heavy steel pot should have been so equipped with clamps that the crane, right beside it, which was customarily used to lift it on and off the furnace (R. 15), could be used to overturn it and empty out its heavier contents when it reached the concrete floor (R. 71). Peti-

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tioner, who worked with the pot day in and day out, said this should have been done (R. 70). Deen testified if the crane could have gripped the pot, he could have tilted the pot and contents over with one finger, and that he could have tilted the pot away from him so that the babbitt would have fallen on the floor and not on him (R. 71). Earl Snow, a fellow-employee and acting blacksmith, testified I-bolts could be fixed in the pot to fasten the hoist to, and that he could have made such attachments in the blacksmith shop (R. 89). Anderson, a fellow employee, said the available tools were not adequate to empty the babbitt out of the steel pot (R. 103).

Instead of viewing this evidence in a friendly light and construing it in favor of the verdict of the jury, the Court of Civil Appeals resorted to certain obvious devices in an attempt to destroy its probative force:

(1) The Court of Civil Appeals, as petitioner has heretofore pointed out, seized upon certain wording in petitioner's pleading to hold that since petitioner pled inadequate help and lack of proper tools in the alternative, it had to prove both acts of negligence to succeed, and respondent need to disprove only either inadequate help or lack of tools in order to succeed (R. 190-191). Therefore, since the jury had found adequate help was furnished, the evidence and findings bearing on lack of proper tools became immaterial (R. 191). As previously pointed out, this is a misinterpretation of the pleadings.

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(2) The Court of Civil Appeals further attempted to discredit this evidence by saying:

> "Furthermore, there is no evidence that the additional tools suggested by Deen and Snow were in use, safe and approved." (R. 190.)

Here the Court of Civil Appeals gets back to an old railroad defense which has been used so many times and in so many cases it would be useless to enumerate them. (See *B. & O. R. Co. v. Groeger, 1925, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419.)* This defense is that the operation of railroads is a scientific matter and that what safety measures or tools they should use should be left to their officers and experts and not to the varying and uncertain opinions of coppersmiths and blacksmiths, like Deen or Snow, or to the varying and uncertain verdicts of juries. This theory has been thoroughly discredited by numerous decisions of the Supreme Court of the United States, hereafter cited. Apart from the fact that all factual questions are for the jury under the Federal Employers' Liability Act, a complete answer to the railroad in this particular case is that if it had any scientific or expert knowledge concerning the safety measures proposed by Deen and Snow, it withheld such information from the jury. The railroad offered no evidence. Why did it not give the jury the benefit of any expert knowledge it had? The railway company's silence materially strengthens the probative force of the evidence offered by Deen:

> *Texas & Pacific Ry. Co. v. Riley (1944) (Court of Civil Appeals of Texas, 183 S. W. 2d 991, writ of*

error refused by the Supreme Court of Texas, certiorari denied, 325 U. S. 873, 65 S. Ct. 1414, 89 L. Ed. 1991).

This is a death case arising under the Federal Employers' Liability Act. The Court of Civil Appeals, in passing on the sufficiency of the evidence to support the jury's findings, said:

> "Moreover, these circumstances are materially strengthened by the failure of appellant to offer any explanation of the occurrence resulting in Riley's death which would excuse it."

The simple device suggested by Deen and Snow which would have enabled the heavy steel pot to be overturned by an available crane is a matter within the judicial knowledge of a court:

Swann v. T. & P. Ry. Co. (1919), Court of Civil Appeals, Texas, 200 S. W. 1131.

> "The existence of hoisting machinery which may be employed for lifting heavy weights is a matter of such common knowledge that evidence to that effect was not required."

Practical suggestions for increasing the safety of operations made by uneducated but practical men have been accepted by the appellate courts in Texas as raising issues of fact for the jury in railway Master and Servant cases despite the very attacks made by the railroad in the *Deen* case. One of the closest cases on the facts to the *Deen* case is:

Galveston, H. & S. A. Ry. Co. v. Brewer (1928) (Court of Civil Appeals, Galveston, writ of error refused), 4 S. W. 2d 320.

Brewer was injured by being struck by a falling heavy timber referred to as a "stringer." He was working for the railway company at the time, helping to load heavy timbers by means of a hoisting machine which consisted of a power appliance, a crane, cables and hooks. Brewer would fasten a hook on one end of the timber, another employee would fasten a hook on the other end, and by means of chains the timber would be hoisted to a railway car. One of the chains, or some connection used therewith, slipped and the timber fell, striking Brewer in the back and injuring him. Brewer introduced in evidence the testimony of a fellow-employee to the effect that the chains leading to the timber were not connected and that if they had been connected at the top by a ring, the accident could not have happened. The simple, practical safety appliance suggested here is analogous to the clamps Deen and the blacksmith, Snow, said should have been affixed to the steel pot to permit its being overturned by the available crane. The cross-examination by the railway company, in the *Brewer* case, followed almost the identical line the cross-examination followed in the *Deen* case. The witness in the *Brewer* case, on cross-examination, stated he had never seen a ring like he testified about. In all the hoisting machines he had seen, he had never seen one like that in use. That he was in the United States Navy over two years during the war and never saw them use an appliance similar to the one he was recommending. The Court of Civil Appeals held that it was

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obvious the simple changes proposed in the *Brewer* case would greatly protect the railway company's employees and was sufficient to support findings of the jury (1) that the railway company did not furnish its employee reasonably safe appliances, and (2) such failure was the proximate cause of his injury. The Supreme Court of Texas refused an application for writ of error, which indicates, in Texas practice, that it approved the holdings of the Court of Civil Appeals on the questions discussed.

(3) The third device the Court of Civil Appeals used in an attempt to destroy the probative force of Deen's evidence and the findings of the jury based thereon, was to read into the jury's verdict something that was not there, i.e., the verdict of the jury established that the railway company provided Deen a safe way to do his job (R. 189-190). The jury did find Deen was negligent in not using available help and this was a proximate cause of his injuries (R. 153). The jury did not say and was not given an opportunity to say whether with additional help Deen could have done the job safely. The jury might have concluded that under no circumstances should Deen have attempted to move a half-ton steel pot alone. To so strain himself would be dangerous. If it were to be manually handled, more help should be used. But the jury might have concluded, if given an opportunity, that even with adequate help the manual handling of the half-ton pot and contents would nevertheless be dangerous. That was the theory of

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the railroad in the trial court. Consider the following cross-examination of Deen by the attorney for the railroad:

> " 'Q. And the strain in getting it' (the melting pot) 'up was over before it' (the babbitt) fell on your foot?
>
> "A. Yes, sir.
>
> "Q. As a matter of fact, these extra men would have been helpful to you only in getting it upright; is that right, Mr. Deen?
>
> "A. Yes, sir.
>
> "Q. And whether there had been five or ten men there, would not have had anything to do with the babbitt falling out of the pot?
>
> "A. No, sir.
>
> "Q. It would have fallen out if the whole shop had been there with you?
>
> "A. It might have fell on two of us." (R. 63.)

Consider the following cross-examination of Snow, a witness called by petitioner, by the attorney for the railroad:

> "Q. All right. And that third man*d* wouldn't have kept the babbitt from falling out, would he, Mr. Snow?
>
> "A. No, sir; I don't think so.
>
> "Q. In other words, the babbitt is coming out after you get the pot up-right, whether there were three men or six men ahold of it?
>
> "A. That's right." (R. 93-94.)

In its Motion for an Instructed Verdict, the railway company urged "it is undisputed that as far as the accident itself is concerned, additional employees could not and

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would not have prevented this happening" (R. 121). In its objections to the court's charge, the respondent said the issue as to whether the failure to furnish additional help was a proximate cause of Deen's injuries should not be submitted to the jury "for reason that under the undisputed evidence the failure to furnish one or more additional men was not and could not be a proximate cause of plaintiff's injuries" (R. 130). We thus have the anomalous situation that the Court of Civil Appeals in stating that the finding of the jury that the railway did not fail to furnish adequate help, when considered in the light of the record, amounted to a finding that the railway furnished Deen a safe way to do his job, resulted in the Court of Civil Appeals' construing the evidence more favorably to the railway than the railway construed it itself. Isn't it a travesty on justice for the Court of Civil Appeals of Texas to tell Deen to limp through life without any compensation because of a fact that the railway company said had nothing to do with the accident?

The warping of the jury verdict by the Court of Civil Appeals of Texas in saying that it amounted to a finding that the railway company provided a safe method for Deen to do his job, was condoned by the Honorable Supreme Court of Texas. The Supreme Court of Texas refused Deen's application for writ of error with no comment other than that the Court of Civil Appeals had committed no reversible error (R. 231). The Court reached this decision within three months after Deen filed his application (R. 198, 230). Apparently the Court's conscience was a little

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bit disturbed by this decision. Deen's motion for rehearing of his application was under consideration ten months (R. 231, 239). While Deen's application for writ of error was pending before the Supreme Court of Texas, the Court decided *Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, opinion of Court of Civil Appeals, 278 S. W. 2d 227.* This was a Federal Employers' Liability Act case. By obiter dicta in the *Ross* case, the Supreme Court of Texas indicated why it was going to refuse the writ of error in the *Deen* case. The Court said, in the *Ross* case, the Court of Civil Appeals was justified in the *Deen* case in concluding that the verdict of the jury and the undisputed evidence established that the railroad furnished Deen a safe way to do the job and therefore was under no duty to furnish him a second method of performing the work. The Court came to an exact opposite conclusion on identical facts in the *Ross* case. We thus have on our hands the interesting situation of the Supreme Court of Texas, in obiter dicta devoted to the *Deen* case, reversing its own decision in the *Ross* case, and in the same opinion. The following comparison of the two cases will convince the most incredulous of the accuracy of this statement.

ROSS CASE	DEEN CASE
1. *Facts*	1. *Facts*
(a) Ross and volunteer fellow-employees seek to overturn drum	(a) Deen and volunteer fellow-employee seek to overturn steel pot
(b) Drum very heavy	(b) Pot very heavy

(c) Additional fellow-employees available to help

(d) Assistance of fellow-employees not sought

(e) Alternate methods of doing job:

(1) placing drum on rack

(2) manually overturning drum with sufficient help

(f) Customary method:

(1) tilting drum with adequate help

(g) Tilting done many times before without mishap

2. *Jury Findings (See opinion of Court of Civil Appeals, 278 S. W. 2d 227)*

(a) Railroad negligent in not placing drum in rack

(b) Such negligence, proximate cause of Ross's injuries.

(c) Ross negligent in tilting drum without seeking or asking assistance

(d) Such negligence, proximate cause of Ross's injuries

(e) Ross's damages, $26,250.00.

(c) Additional fellow-employees available to help

(d) Assistance of fellow-employees not sought

(e) Alternate methods of doing job:

(1) lifting pot with available crane

(2) manually overturning pot with sufficient help

(f) Customary method:

(1) tilting pot with adequate help

(g) Tilting done many times before without mishap

2. *Jury Findings (R. 151-156).*

(a) Railroad negligent in not furnishing proper tools

(b) Such negligence, proximate cause of Deen's injuries

(c) Deen negligent in tilting pot without obtaining additional help.

(d) Such negligence, proximate cause of Deen's injuries.

(e) Deen's damages, $21,450.00

3. *Conclusion of Supreme Court of Texas*	3. *Conclusion of Supreme Court of Texas*
(a) The jury verdict does not amount to a finding that the railway company provided Ross a safe method to do his job because:	(a) The jury verdict does amount to a finding that the railway company provided Deen a safe method to do his job because:
"The jury could have reasoned that if the plaintiff had obtained the help of another workman, he would not have been injured from the effort of tilting the drum, but that the method was nevertheless unsafe because either or both of the workmen might be injured if they lost control of the drum." (Supreme Court's opinion, Ross case, at page 224.)	"We agree with the Court of Civil Appeals that the verdict of the jury and the undisputed evidence establish that the railroad furnished one reasonably safe way to do the job and therefore was under no duty to furnish a second method of performing the work." (Supreme Court's opinion, Ross case, at page 225.)
4. *Judgment:*	4. *Judgment:*
Ross—$26,250.00	Deen—nothing

Such judicial gymnastics were too much for the Honorable Clyde E. Smith, one of the Justices of the Supreme Court of Texas. While agreeing with the opinion of the Court so far as the *Ross* case was concerned, he dissented from the obiter dicta in the *Ross* case devoted to the *Deen* case, in the following words:

> "I am in agreement with the holding in this case;" (Ross case) "however, I am not prepared to agree with the conclusion in regard to the case of Gulf, C. & S. F. Ry. Co. v. Deen, Tex. Civ. App., 275 S. W. 2d 529,' that 'We agree with the Court of Civil Appeals that

> the verdict of the jury and the undisputed evidence establish that the railroad furnished one reasonably safe way to do the job and therefore was under no duty to furnish a second method of performing the work.' I, therefore, do not join in the conclusion reached as to the Deen case. In all other respects, I agree with the majority opinion." (Ross case opinion, page 228.)

It is ironical that the distinction which the Supreme Court of Texas labored so hard to make between the *Deen* and the *Ross* cases was one which, even if it existed—which it doesn't—would be wholly immaterial. This is clear from the following decisions:

> *Clyde Wilkerson v. Wilson McCarthy and Henry Swan, as Trustees of Denver & Rio Grande Western R. Co., Utah 1949, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497, reh. den. 336 U. S. 940, 93 L. Ed. 1098, 69 S. Ct. 744.*

In this case the employee elected to use a dangerous method of doing his work instead of a safe one. He slipped and fell from a board while crossing a pit. The Court said:

> "There was, as the state court pointed out, evidence to show that petitioner could have taken a slightly longer route and walked around the pit, thus avoiding the use of the board. This fact, however, under the terms of the Federal Employers' Liability Act, would not completely immunize the respondents from liability if the injury was 'in part' the result of respondents' negligence. For while petitioner's failure to use a safer method of crossing might be found by the jury to be contributory negligence, the Act provides that 'contributory negligence shall not bar a recovery, but

> the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee'."

That is the rule that the trial court observed in submitting the *Deen* case to the jury and in rendering judgment on the verdict of the jury (R. 150-157). A similar question was passed on by the United States Court of Appeals, Fourth Circuit (1952), in

Virginian Ry. Co. v. Viars, 193 F. 2d 547, 550.

Employee was electrocuted while exploding dynamite in the course of his employment. Defense urged that the employee elected to use a dangerous rather than a safe method of doing his work. The Court said on this point:

> "If, however, plaintiff adopted a dangerous way of doing the work, when a safe one was open to him, this amounted to nothing more than assumption of risk or contributory negligence, neither of which excuses defendant's negligence or bars recovery under the Federal Employers' Liability Act. Tiller v. Atlantic Coast Line Ry. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497. If plaintiff was guilty of negligence in using the dynamite, this did not bar him of recovery, if defendant was also guilty of negligence which contributed to his injury but went merely to the reduction of damages. This aspect of the case was fairly presented by the trial judge in his charge to the jury."

Deen has been deprived of his right of trial by jury by the appellate courts of Texas, whether that right is tested by previous decisions of the Texas Courts in similar cases, as *Galveston, H. & S. A. Ry. Co. v. Brewer, 4 S. W. 2d*

320, and *Port Terminal Railroad Association v. Ross, 289 S. W. 2d 220*, or by the decisions of the Honorable Supreme Court of the United States in its construction of the Federal Employers' Liability Act.

The Honorable Supreme Court of the United States has said so many times and so clearly that the Congress has made the jury the fact-finding body in Federal Employers' Liability cases and that the Court is not going to permit appellate courts, by substituting their findings for those of the jury, to deprive injured employees of a goodly portion of the relief that the Congress has given them, that it seems puerile to argue the point.

> *Atlantic Coast Line Railroad Company v. Anderson (1955) (U. S. Court of Appeals, 5th Circuit), 221 F. 2d 548.*

This case is of great interest to lawyers in Texas because it arose in the Fifth Circuit. In many ways the facts are analogous to the *Deen* case. Chief Justice Hutcheson, speaking for the Court, held the evidence not sufficient to support the jury verdict. Suit was brought in two counts under the Safety Appliance Act and the Federal Employers' Liability Act. The Supreme Court granted writ of certiorari and disposed of the case without written opinion.

> *Anderson v. Atlantic Coast Line Railroad Company (1955), 350 U. S. 807, 76 S. Ct. 60, 100 L. Ed. ....., rehearing denied, 350 U. S. 905, 76 S. Ct. 176, ... L. Ed. .....*

Other cases upholding jury verdicts in Federal Employers' Liability cases are:

Tiller v. Atlantic Coast Line R. Co. (1942), 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465;

Bailey v. Central Vermont Ry. Co. (1942), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;

Tennant v. Peoria & Pekin Union R. Co. (1944), 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520;

Blair v. Baltimore & Ohio R. Co. (1944), 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490;

Lavender v. Kurn (1946), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916;

Ellis v. Union P. R. Co. (1947), 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572;

Wilkerson v. McCarthy (1948), 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; and

Stone v. New York, C. & St. L. R. Co. (1953), 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441.

The following cases are now before the Court on certiorari and have not yet been decided:

Schulz v. The Pennsylvania Railroad Co. (1955) (U.S. Court of Appeals, 2nd Circuit), 222 Fed. 2d 540; (This case arises under the Jones Act.)

Webb v. Illinois Central Railroad Company (1955) (U. S. Court of Appeals, 7th Circuit), 228 Fed. 2d 257.

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The great humanitarian and liberal principles embodied in the Federal Employers' Liability Act by the Congress and interpreted by this Court have meant little to the Supreme Court of Texas. When the great, humanitarian decisions noted above of the Honorable Supreme Court of the United States were brought to the attention of the Honorable Supreme Court of Texas, in Deen's application for writ of error, that Court said of them in its obiter dicta about the *Deen* case in

> *Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 226:*
>
> "The decisions of the Supreme Court" (United States) "which are cited by the parties represent only that Court's appraisal of the facts there involved, and are of little assistance in the determination of cases which are not factually analogous."

The Supreme Court of Texas is still waiting for a clear mandate from the Supreme Court of the United States as to what it really means when it says injured employees must not be deprived of their right of trial by jury in Federal Employers' Liability Act cases, and has encouraged Texas appellate courts to continue, as in the *Deen* case, to substitute their findings for that of the jury, in these words:

> "So long as that Court" (Supreme Court of the United States) "continues to pay even lip service to the principle that liability of the railroad employer is based only upon negligence, it is incumbent upon the state courts to recognize and apply the principle in cases presented for their determination. Until required to do so by a clear and positive declaration of the highest federal tribunal, our trial and appellate

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> courts cannot and should not give effect to a jury finding of negligence when in its opinion the record is completely devoid of evidence in support of same." (Obiter dicta re. Deen case, Ross Opinion at page 226.)

Why should a trial court obtain a jury finding if the record is completely devoid of evidence in support of same? Are jury findings to be followed if they correspond to the Court's evaluation of the facts, but otherwise disregarded on the ground that the record is completely devoid of any evidence to support them, as the Court of Civil Appeals did in the *Deen* case? It is truly remarkable that in the *Deen* case the Court of Civil Appeals found the jury properly weighed the evidence when it made findings in favor of the railroad but improperly weighed the evidence when it made findings in favor of Deen. As petitioner has heretofore pointed out, application for writ of error was filed in the Supreme Court of Texas in the *Deen* case March 28, 1955 (R. 198). It was refused June 29, 1955 (R. 230). Motion for rehearing of the application was overruled April 25, 1956 (R. 239). It thus took the Supreme Court of Texas one year and one month to decide that the record in the *Deen* case was completely devoid of any evidence in support of any jury findings in favor of Deen.

CONCLUSION

Petitioner prays that the judgment of the Court of Civil Appeals that he recover nothing herein (R. 191) be reversed and that the judgment of the trial court that plaintiff, Earl R. Deen, do have and recover from the said defendant,

Gulf, Colorado & Santa Fe Railway Company, the sum of $21,450.00, together with interest thereon at the rate of 6% per annum from April 26, 1954 (R. 157), be affirmed, and that costs of court be taxed against the respondent, and petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

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January 7, 1957.

I certify that a copy of the foregoing Brief on the Merits for the Petitioner has been mailed, on the 7th day of January, 1957, to the respondent's attorneys, as follows: to Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas; and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas.

/s/ ROBERT LEE GUTHRIE

ROBERT LEE GUTHRIE.

FEB 4 1
JOHN T. FEY,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 199

EARL R. DEEN, *Petitioner*,

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 199

EARL R. DEEN, *Petitioner,*

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent.*

RESPONDENT'S REPLY BRIEF

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Earl R. Deen, has filed a "Brief on the Merits", and the respondent, Gulf, Colorado and Santa Fe Railway Company, without relinquishing its contention that certiorari was improvidently granted, presents this its brief on the merits.

JURISDICTION

Respondent concedes that this is an action properly brought under the Federal Employer's Liability Act (45 U.S.C.A. Sec. 51-59) by a railroad employee engaged in interstate commerce against an employer engaged in interstate commerce. On the other hand, the plaintiff in this case of his own volition chose not to file the suit in the United States District Court. He chose instead to file the suit in the District Court of

Brown County, Texas. While the record naturally could not show why he made this selection, it is obvious that by doing so he obtained a jury of his friends and neighbors he would not have obtained had he filed the suit in the United States District Court at San Angelo, Texas, and we think it is certainly true that he and his attorney believed that his chances were better and the probabilities of a high verdict were greater in the state court than in the federal court.

Pleadings of both parties were in accordance with state practice, the trial was in accordance with state practice, the submission of the case to the jury on special issues was in accordance with state practice. The jury's verdict in this case is embodied in their answer to special issues submitted in accordance with state practice. He had a jury trial, and the judgment appealed from to this Court is the judgment of a Texas Court of Civil Appeals, who construed the Texas pleadings, the Texas jury verdict, and entered judgment thereon in favor of the respondent.

It may be that, this Court having granted certiorari, it would be improper for the respondent to waste the Court's time with any extended argument or presentation of authorities. However, this Court can, of course, after further consideration, dismiss the writ as improvidently granted. Therefore, we will merely state to the Court that, while this Court did hold in *Brown vs. Western Railway of Alabama*, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100, that a rule of pleading of the State of Georgia which denied an employee of a railroad company the right of a trial by jury created jurisdiction in the United States Supreme

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Court, that case certainly has no application here, where the plaintiff had a jury trial and had a fair opportunity to obtain a verdict in his favor. Illustrative of the cases in point is *McGoldrick vs. Gulf Oil Corporation*, 309 U.S. 2, 60 S.Ct. 375, 84 L.Ed. 536. Certainly, applying the Texas Rules of Civil Procedure to Earl R. Deen's cause of action did not put "unreasonable obstacles" in his way, nor was he deprived of a jury trial. In any event, petitioner does not contend that the Texas Rules of Civil Procedure deprived him of a jury trial (see petitioner's brief, p. 3).

QUESTIONS PRESENTED

By Petitioner:

The question presented is whether the Court of Civil Appeals of Texas in sustaining all issues found by a jury in favor of the railway, respondent herein, and in disregarding all issues found by a jury in favor of the injured employee, petitioner herein, *and by reading into a verdict something that is not there*, and in setting aside a judgment of a trial court, rendered in favor of the injured employee on the verdict of the jury, has deprived the injured employee of the right of trial by jury given him by the Congress under a Federal Statute generally known as the Federal Employers' Liability Act. (Italics ours.) (Petitioner's Brief p. 3)

By Respondent:

(1) The jury's verdict, which petitioner admits is well supported by the evidence, that the employer fur-

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nished to the employee sufficient help to do the work with safety entitled the defendant to judgment.

(2) The employer's duty is to furnish a reasonably safe method of performing the work, and the jury having found that the employer did furnish one reasonably safe method, to-wit, doing the work manually with adequate help, and that such help was available, the employer had no duty to furnish an additional safe method.

(3) Petitioner, having brought suit in the state court and having alleged that the defendant was negligent in failing *either* to furnish adequate help or proper tools, had the burden of establishing that the employer did neither, and the jury having found that adequate help was furnished, the judgment of the Court of Civil Appeals in favor of the defendant employer was correct.

(4) The construction by the Texas court of Texas pleadings, Texas jury findings, in the light of the record, is binding upon the United States Supreme Court.

(5) The only issues of negligence on the part of defendant raised by the evidence was failure to furnish sufficient help to do the work with safety and the failure to furnish supervision, and the jury having found both of these issues in favor of the defendant, the Court of Civil Appeals correctly rendered judgment, the evidence being insufficient to support the jury's finding of negligence in failing to furnish tools, and that such failure was a proximate cause of the alleged injury.

STATEMENT OF THE FACTS

The opinion of the Court of Civil Appeals contains a very detailed statement of the facts, which are largely undisputed, and the situation is so simple that we will not make a detailed statement, which would be repetitious of the Court of Civil Appeals opinion, which is printed in the record at page 177 to 191.

The following statement, which is quoted from petitioner's brief, is incomplete but not affirmatively inaccurate, and with the additions set out below, should furnish enough factual statement for this brief, since we know the Supreme Court will consider the statement of facts, which is brief, and the statement as contained in the Court of Civil Appeals opinion. We quote from petitioner's brief, from page 7 to the top of page 9:

> "Deen had worked as a coppersmith about eleven years prior to July 12, 1949, the date of his injury (R. 11). On that day a locomotive was in the shops for repair (R. 13). The assistant foreman, Mr. Williams, told him: 'I have got to have this engine today' (R. 13). Babbitt, an alloy of antimony, copper and tin, was necessary for these repairs (R. 15). The babbitt available was in a cracked pot in the furnace that leaked so badly the molten metal would put out the fire underneath (R. 15). Shortly after the assistant foreman, Williams, told Deen the locomotive had to be out that day, W. J. Bettis, Clerk to the general foreman, Johnson, told Deen in the presence of Mr. Johnson that his new babbitt pot had arrived at the freight depot, that men from the store department had gone for it and if he had

the old one off the furnace the men on arrival could assist him with the new one (R. 14, 76). The old pot weighed 250 pounds and contained solidified babbitt weighing 650 to 700 pounds (R. 18). Deen attempted to get the old pot off the furnace alone and to get the babbitt out of the old pot so that he would have everything ready for the new pot and be ready to do his part in melting the babbitt for use on the engine as soon as possible (R. 18). A crane on a pole affixed to the concrete floor with a hoist was right beside the furnace for lifting heavy objects (R. 14). The 250-pound steel pot, about a yard long, ⅔ of a yard wide, and ⅓ of a yard deep (R. 17), containing 650 to 700 pounds of babbitt, a total weight of almost half a ton, fitted so snugly in the furnace that it was necessary to pry its 1½ to 2-inch rim (R. 19), off the brick furnace a height of about an inch (R. 14) so as to allow the arms of the crane to grip it and lift it from the furnace (R. 14-15). A buggy bar or pinch bar was used by Deen to pry the pot and babbitt off the furnace so it could be gripped by an available crane (R. 14). Deen did this work alone and in the process the pot and babbitt crashed to the concrete floor (R. 15). Chance thus selected the spot on the floor where the heavy pot, with its heavier contents, was placed, although Deen testified it dropped just about where he would have set it down (R. 49). It fell upright and Deen decided that since babbitt on cooling contracts more than steel, if he could turn the pot over, the babbitt would fall out and be available for the new pot on its briefly anticipated arrival (R. 18). He struggled alone to overturn the pot but was unsuccessful (R. 18). Earl Snow, a fellow-employee, working as an acting blacksmith in the shop near-

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by, saw Deen's struggle and voluntarily came to his aid (R. 18, 19). The two tried to overturn the pot away from them but were not strong enough to do so (R. 18). Deen braced himself on the furnace (which was crowded close to the pot) and Snow on the work bench, and, by pulling the pot towards them, they were able to raise it slowly to an upright position (R. 19), when the babbitt sloughed out of the pot (R. 19) very fast (R. 97). The babbitt struck the right leg of Deen (R. 19), crippling him for life (R. 40). The customary method of handling the extraction of solidified babbitt from the steel pot had been to lift the pot and the babbitt off the furnace with the crane, as Deen did, place it on the floor, release the arms of the crane, get five or six men to come and turn the pot over manually, empty out the contracted babbitt, and then again attach the arms of the crane and hoist the pot back on the furnace (R. 52, 71, 103, 104)."

Now, the petitioner has made no attempt to refer to the testimony, which is detailed in the Court of Civil Appeals opinion, showing that the old pot had sprung a leak some three or four weeks prior to this time (a pot ordinarily lasts from five to ten years), and during the preceding two or three weeks Deen had supervised this same operation, using five or six men to help him (R. 52, 61). Where it was done with sufficient help, the "pot" was turned away from the men and, of course, the babbitt fell out without endangering anyone, and even Deen admitted that it could be done safely that way (R. 64).

Petitioner further makes no attempt to detail the evidence showing that adequate help to do the work

in safety was readily available to Deen but that he chose to attempt to do the work alone rather than doing it the customary method and in fact the only method which had ever been provided by the employer. The reason being given by petitioner being (and we quote from petitioner's brief on the merits, p. 18):

> "Since both sides accept the findings of the jury that the railway company furnished adequate help and this was negligent in not using such help and this was a proximate cause of his negligence, a summary of the evidence on these points is unnecessary."

The same statement is made by petitioner in the brief on the merits on page 11. We will, therefore, merely state that there was ample evidence to support the jury's finding that the railroad company furnished adequate help. There was, of course, evidence to the contrary, but since the jury found in favor of the defendant, and since petitioner concedes that the evidence was sufficient, perhaps it would be burdensome to here detail it.

Now, the next additional fact that should be called to the Court's attention is that, as above indicated, the *only method* provided by the defendant for doing this work was to do it manually. That is, the railroad company did not provide any other way of doing the work other than tipping the pot over manually with plenty of help. The other method suggested by the plaintiff, had never been used and was not even claimed to be safe. About this Earl Deen testified as follows (R. 58):

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"Q. All right, now, Earl, if I misquote you, please tell me; as to getting that babbitt, so far as that is concerned, you might have been able to break it with a sledge hammer or some other way, but you figured that the safest way was to turn it over?

"A. That's right.

"Q. All right; whose decision was that?

"A. I don't remember, but as well as I remember we both talked about it.

"Q. Who talked about it?

"A. Me and Earl Snow.

"Q. Well, Earl who was in charge of removing that pot and the babbitt, you or Earl Snow?

"A. I was.

"Q. Well, anyway, you agree that is the best way to do it, don't you Earl?"

"A. Yes, sir."

Plaintiff's idea was that a clamp could have been designed to be attached to the cast iron pot and then the hoist hooked to the clamp. In the record, the court reporter has sometimes referred to them as "seat clamps", sometimes as "C-clamps", and sometimes as "vice clamps". It is true that the plaintiff testified that it would be possible to conceive of some type of clamp which could be clamped on the side of this cast iron pot and then the hoist attached to the clamp, etc. (R. 75).

However, he also testified that this very procedure was unknown, had never been used, and dangerous. We quote from Deen's testimony (R. 78):

"Q. Question 189: Because of the size of the

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thing and the way it was built, the only way to get that babbitt out was to have two men get hold of it and turn it over; a third man might help, but he would not be of any help on lifting? Answer: 'Well, a man might build a vice clamp on it' and you answered that, didn't you?

"A. Yes, sir.

"Q. Question: Do you know of any device like that in use? Answer: 'No, sir' did you say that?

"A. Yes, sir.

"Q. Question 191: You know of no device that would hold it? Answer: 'We had things to lift so it could not turn or roll, that is, so long as your hoist stuck so that you can get it turned over and get the babbitt out, but you are likely (fol. 112) to throw a piece of cast iron through it; it is dangerous' did you answer that?

"A. Yes, sir.

"Q. Is that true?

"A. Yes, sir.

"Q. Now, let's get back to the matter of clamps; you had never asked anybody for clamps?

"A. No, sir."

While the designation of the record herein served on the respondent lists as Item 3 "Procedings in the Trial Court (Statement of Facts, with Clerk's Certificate, page 159)", and while in that Statement of Facts, from page 149 to 157, appears a series of pictures which explain more than 500 pages of counsel's statement, for some reason those pictures were not reproduced in the record which was delivered to respondent. Five of those pictures, being Defendant's Exhibits 1, 2, 3, 4, and 5, were taken the same day

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that plaintiff was injured, and show the babbitt pot with the piece of babbitt lying alongside of it, and the furnace with a new pot in it. These pictures were identified by the plaintiff himself (R. 52-53). We wish these had all been printed in the record or the originals had been sent up; however, reproducing them in a brief is a little difficult. Petitioner's counsel assures us that the ommission was because of the clerk's difficulty in reproducing them, and we hope that they are available to the Court.

With the permission of petitioner's counsel, we are enclosing in the flap at the back of this brief Defendant's Exhibit No. 3, which was identified as a picture of the old pot with the babbitt out of it and Mr. Snow, the employee who was helping the plaintiff when he was injured, holding it up so that the camera could look down into it. We are also enclosing with this brief, in the same flap, Defendant's Exhibit No. 5, which pretty well shows the whole layout. At the left is a picture of the babbitt furnace, with the new pot in it. In the immediate foreground is the old babbitt pot, sitting right side up, and just beyond it is the solidified babbitt, which came out and broke Deen's leg.

If, for any reason, the Supreme Court does not have the pictures which were attached to the Statement of Facts in the Court of Civil Appeals, and if the Court has any objection to using this method of presenting them, we will, of course, have them sent up or reproduced in any manner which will let the Court consider the entire record in the case.

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A very few additional undisputed facts should be added. While plaintiff did testify that there was a reason for hurrying to get the old babbitt pot out, he further admitted that, having got the old babbitt pot out and on the floor safely and without any injury to him or anyone else, the furnace was then empty, and on the arrival of the new pot from this storehouse, he and the storehouse helpers could have put in the new pot and then flopped over the old pot, taking the babbitt out of it (R. 59, 60 and 61). In other words, any hurry which there might have been was over when the babbitt pot was out and on the floor, which was prior to any injury to Deen. All he had to do was wait a few minutes and the storehouse employees would have been there with the new pot, and they and he could have put it in and flopped over the old pot without any danger to anybody. He didn't wait, and the injury resulted.

In the further interest of accuracy, petitioner's statement, in several places in the brief on the merits (for example, pages 23 and 24) to the effect that he might have been injured with adequate help, is quoted out of context. We quote from Deen's testimony (R. 62-63):

> "Q. Well, now, as to the way or method—I am asking as to the time—that particular time to get the babbitt out; that was your decision, and you said it was, and now as to the way or method of getting it out, who made the decision as to how to get it out?
>
> "A. I don't know whether it was me or Mr. Snow.

"Q. Did Mr. Snow tell you how to do it?

"A. I don't know that he did and I don't know that he didn't; but he walked over there and I know that we did discuss it.

"Q. Whose responsibility was it? As to how to get it out?

"A. Well, I suppose that it was mine, but it is very often that you will confer with your fellow man and get his opinion on anything.

"Q. Well, in any event, you either made the decision or you concurred in it, didn't you—agreed to it?

"A. Yes, sir.

"Q. No foreman told you to do it that way?

"A. No, sir.

"Q. All right; now, actually you came up with that pot, and you and Snow came up with it, you pulled with your left hand and he with his right and just before you came up with it, one of you said 'Look out for your toes, that might crush it,' or something of that sort?

"A. Yes, sir.

"Q. Then you knew if that babbitt fell out it could hurt (fol. 89) you and hurt you bad, didn't you?

"A. Yes, sir.

"Q. And you wanted it to fall out as a matter of fact, didn't you?

"A. Yes, sir.

"Q. That was what you wanted?

"A. I wanted it out.

"Q. And whether it fell out, or slumped out, you didn't know which way it would come out?

"A. No, sir.

"Q. And the strain in getting up was over before it fell on your foot?

"A. Yes, sir.

"Q. As a matter of fact, these extra men would have been helpful to you only in getting it upright, Mr. Deen?

"A. Yes, sir.

"Q. And whether there had been five or ten men there would not have had anything to do with the babbitt falling out of the pot?

"A. No, sir.

"Q. It would have fallen out if the whole shop had been there with you?

"A. It might have fell on two of us.

"Q. Yes, and your foot might have been in the same spot that it was if there had been two other people helping you with it?

"A. *No, sir.*

"(fol. 90) Q. Well, now, where we differ again, I thought I asked you about that; I hate to keep going back to this, but this is all that I know as to what you know about this, Mr. Deen. I am turning you to page 23, question 173, and starting with question 173 on page 23 of your deposition and I am going to read the question and your answer to it; question 173: 'All right, now, if you had as many as four people lifting on that pot, where would your leg have been?' Answer: 'On the other side of it, but four people, I don't believe four people could get around it in order to do much lifting.' Did you answer that?

"A. Yes, sir.

"Q. Is it true?

"A. As far as I know.

"Q. Then question 174: 'That is what you

think, as a matter of fact, you think it was a two man job?' to which you answered: 'Almost a two man job, a third may could be there and help.' Did you answer that?

"A. Yes, sir.

"Q. Is it true?

"A. Yes, sir."

Immediately following the last above quoted part, he went on to point out that the fourth man would have been more in the way than a help. We pick up with his testimony again on page 64:

"Q. All right. Let's get back to these decisions. Whose decision was it to put your foot where that would fall, if it fell it would fall on it?

"A. Mine.

"Q. All right, sir. *Now, being fair, Mr. Deen, with this jury, there wasn't anything dangerous about that, if you kept your feet out of the way, was there?*

"A. *It didn't look like it.*

"Q. All right. And, if your foot had been back, it would have fallen out just the way you wanted it to, right on the pavement, on the paved floor of that shop, wouldn't it?

"A. Yes, sir.

"Q. All right. Then the decision as to putting your foot in the way was Earl Deen's decision, was it not?

"(fol. 92) A. I suppose it was.

"Q. Well, did Mr. Snow tell you how to put your feet, or the foreman or anybody tell you how to put your feet?

"A. No, sir.

"Q. All right, sir —

"A. And nobody didn't tell me to move it.

"Q. Nobody told you to move your foot or to leave it there?

"A. That's right.

"Q. All right. *The truth about this, Mr. Deen, is that except for that one moment of forgetfulness, the kind of thing that any man could do, you or me or anybody, there wasn't anything wrong with the way that job was done that day, was there?*

"A. *It don't look to me like there was.*

"Q. All right. Outside of that one moment of forgetfulness to get your foot in the way, that was the only thing that was wrong that day; is that right?

"Mr. McCord: I object to that, your Honor, the certain words of forgetfulness; Mr. Deen hasn't testified that he forgot anything.

"Court: I overrule the objection.

"Mr. McCord: Note our exception.

"Q. There wasn't anything wrong with that operation out there that day, outside of your foot being in the way when that babbitt fell out?

"A. So far as I know.

"Q. There wasn't?

"A. That's right."

(Italics ours.)

The business about it being dangerous with four or five men meant that if Deen was going to forget and put his foot in front of it, as he did on the occasion of the injury, he would get hurt.

The petitioner violently attacks the Court of Civil

Appeals for construing the jury's verdict as establishing that the employer furnished a reasonably safe method to do the work and holding that such finding was a finding that the employer had fulfilled its duty and therefore was not negligent. However, the petitioner's attorneys have recognized that their real trouble in this case is not the Court of Civil Appeals, it is that their client, Earl Deen, had told the truth when he testified as we have quoted above, and that the truth, plus the jury findings, of course, put him out of court. We quote from the petitioner's motion for rehearing in the Court of Civil Appeals in this case (R. 197):

> *"We ask the Honorable Court of Appeals not to close the door on this plaintiff's claim even though because of innate honesty and lack of intelligence he made some general admissions that a more wily and dishonest person would not have been led into."*

This is the first time that we have ever seen an attorney apologize in an appellate court for his client's honesty. Where a truthful plaintiff has failed to convince a jury on the essential issues in his case, it cannot be grounds for giving him a new trial that, had he been willing to lie, he could have made out a stronger case. The object of a court of justice is to arrive at the truth, and if the plaintiff cannot make out a case telling the truth, he is not entitled to recover. We can admire Earl Deen because he would rather tell the truth than lie and win his law suit, and to say that his reward for telling the truth in this case was a judgment in favor of the defendant may evoke sym-

pathy. If it invokes sympathy, then it has to be on the assumption that most verdicts for employees in F.E. L.A. cases are based on perjury and that it would be a shame to let a perjurer recover and have an honest man take nothing. No court to our knowledge has endorsed this doctrine, and until there is a provision of law which entitles a man to compensation for truthfulness, it cannot be endorsed by any court.

Now, summarizing the whole thing, here was Deen, an experienced man, who was in charge of this particular operation and who was thoroughly familiar with what he had to do and how to do it. The actual operation was simplicity itself. If the Court will get the pictures out of the pocket part of this brief and particularly look at the one which is numbered Exhibit 5, it shows the babbitt furnace on the left, with the new pot sitting in it. On the floor is the old pot, and the slap of babbitt, which was, at the time Deen started, in the old pot. What Deen had to do, sooner or later, was to take the old pot out of the furnace so that the new one could be put in, and then get the babbitt out of the old pot so that the babbitt could be put into the new pot. The old babbitt pot had sprung a leak some weeks before, and he had done the same operation at least three times in the preceding three weeks, each time in the same way, except that on all of the other occasions he had had four, five or six men to help him.

On this occasion he was told by a clerk that the new pot had arrived and that the storehouse crew would be bringing it to install. Deen testified that no one told him to do the work at that particular time, and no

foreman told him specifically how to do the work at that particular time. He further testified that he knew at least as much about the job as anybody working in the shop. He went alone to the room where this babbitt furnace was, and alone, with the help of the hoist which was installed in the room, got the old babbitt pot out of the furnace and on the floor. At that time he was ready for the new pot when it arrived with the storehouse crew, and that crew would help him put it in the furnace. The old pot was on the floor, out of the way, and it could be emptied at any time. Deen, while he was waiting for the crew to show up, tried to turn the pot over alone. The actual operation of flopping the pot over is nothing more complicated than turning over any oblong object. It is just like emptying a tub or horse-trough or a vat. You merely push it away from you and roll it over where it is bottom up. That was all that Deen was going to do. He found that it was too heavy to handle by himself, and instead of asking for additional help, or instead of waiting until the storehouse crew got there, he kept on tugging, and finally Snow came over and helped him. Between them, they got the pot on edge, and, although they had said to each other, "Watch out for your toes" (R. 19), Deen hadn't got his foot out of the way, and when the babbitt fell out it fell on his leg. Deen wasn't surprised to have the babbitt come out of the pot; that is what he was trying to do. And once he got it upright, the need for additional help, of course, terminated, because the only remaining thing to do was that the babbitt would either fall out or the pot would be allowed to fall face

down, knocking the babbitt on the floor. It is true that Deen, and Snow and Anderson, plaintiff's witnesses, testified that if there had been more men available, they would have turned the pot away from the plaintiff, and therefore his foot would not have been in front of the pot, but would have been behind the pot, and the babbitt would have fallen out without striking him. But that is where the jury found against him. The jury found that the railroad company furnished Deen adequate help to do the work in reasonable safety and that he was negligent in not availing himself of that help. The method of doing the work designated by the employer was to do it manually with plenty of help, and that was the only method which the employer provided. The jury found that that was a reasonably safe way to do the work, and therefore the plaintiff lost his law suit.

The petitioner makes no attempt to indicate the evidence with reference to the man's injuries. He did have a broken leg, he got excellent medical treatment, and he was off work from July 12, 1949, until April 3, 1950 (R. 47). His actual out-of-pocket loss for the period was $2,350.00 (R. 47). He returned to work on April 3, 1950, and his testimony is (R. 47):

> "Q. All right, now, April 3, 1950, is when you went back to work?
>
> "A. Yes, sir.
>
> "Q. And this past April 3, 1954, was four years later?
>
> "A. Yes, sir.
>
> "Q. During that time, Earl, isn't—a fact that you worked pretty darned steady?

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"A. Yes, sir.

"Q. As a matter of fact, during that time, four years, other than your regular vacations—your regular days off—you had less than thirty days during the four years that you have been off the job?

"A. I am sure of that."

His wages were 50c an hour more at the time of the trial than they were at the time he got hurt (R. 48). He is, of coures, still working.

PLEADINGS AND JURY FINDINGS

Plaintiff went to trial on his First Amended Original Petition (R. 1-6). The petition was drawn in compliance with the Texas practice, and alleged the happening of the accident in detail. Throughout, the plaintiff recognized that the employer did not have to furnish both tools and sufficient help. The following quotations (italics always ours) from Paragraph IV of the plaintiff's amended petition (R. 3-4) demonstrate that beyond question:

"* * * That by virtue of such knowledge, the duty rested upon the Defendant through Plaintiff's foreman to have available to Plaintiff *proper tools* with which to remove the babbitt from said old pot, *or in the alternative sufficient help* to remove such babbitt without the use of tools, and further that the duty rested upon the store department of the Defendant to notify Plaintiff's said foreman that the new pot was being delivered for installation. * * * That because of the tremendous weight of said melting pot, the Plaintiff immediately ascertained therein *unless he had adequate*

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tools to grasp said pot and give the Plaintiff sufficient leverage to turn the pot over, or in the alternative that he have sufficient help to tip the edge of said pot over and turn the same in the direction away from the Plaintiff. * * *That because of the lack of sufficient help or sufficient tools,* it then became necessary for the plaintiff and the said Snow to grasp said pot upon its edge and pull the same towards them in order to turn the same over, and that in so doing, the babbitt fell out of said pot as the same was being turned over, striking the Plaintiff's leg about four inches above the right ankle. *That had the Plaintiff had sufficient help, to-wit, at least two other persons, to assist in turning said pot over, the (fol. 6) same could have been done by lifting the same and turning it over away from the said Plaintiff and the said Snow, but because of the negligence of the Defendant in failing to furnish sufficient help or sufficient tools to accomplish said purpose, the injuries herein set forth were received by this Plaintiff.* * * *

"A. That the Defendant was negligent in not notifying Plaintiff's foreman that the new melting pot was being sent to the roundhouse for installation, in order that said foreman would have *had proper tools as herein described* for the removing of said babbitt, *or in the alternative having sufficient help,* as herein mentioned, to remove said babbitt without the use of tools.

"B. That the Defendant was negligent in not having the foreman present and proper supervision.

"C. That the Defendant was negligent in not furnishing Plaintiff with proper tools, *as herein described,* to remove said babbitt.

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"(fol. 7) D. That Defendant was negligent in not furnishing at least two additional men to assist Plaintiff in removing the babbitt from said pot."

At the conclusion of plaintiff's evidence, the defendant rested without putting on any character of testimony (R. 113).

Now, in Texas, a damage suit, like any other civil law suit, is tried on special issues, and the Court's charge appears in the record (pages 113 to 120). These special issues are merely questions of fact, which the jury answers, based on definitions and other instructions of the Court. The substance of these findings was, as plaintiff points out (petitioner's brief, pages 5 and 6):

(1) that the defendant failed to furnish Deen proper tools, that such failure was negligence and a proximate cause of his injuries;

(2) that the railroad furnished adequate help;

(3) that the railroad furnished proper supervision;

(4) that Deen was negligent in failing to obtain additional help, which was a proximate cause of his injuries;

(5) that he was not negligent in the way and manner he did his work;

(6) that the railroad could reasonably anticipate Deen would do the work by hand;

(7) that Deen's conduct was not the sole proximate cause of his injuries;

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(8) that $39,000.00 would be "reasonable" compensation;

(9) that Deen's own negligence reduced the recovery by $17,550.00 (R. 151-154).

Both parties filed motions for judgment on the jury's verdict, and the defendant, in addition, pursuant to Texas Rules of Civil Procedure No. 301, (copied in appendix) filed an additional motion for judgment on the verdict, disregarding Issues 1, 2, and 3 therein (see Trial Court's judgment, R. 156). The Trial Court, after hearing all motions, overruled all the defendant's motions and sustained plaintiff's motion for judgment on the verdict, and entered judgment in favor of the plaintiff for $21,450.00. Appeal was duly perfected.

Defendant's pleadings (R. 6) first contained special exceptions to the plaintiff's allegations with reference to proper tools (Paragraph I), a general denial, contributory negligence, sole cause, and unavoidable accident. Petitioner states in its brief in several places (see petitioner's brief, p. 15, last paragraph, and bottom of p. 16) that the defendant did not except to the pleading of proper tools. That is not true, as shown by the defendant's answer, and also as shown by judgment of the Trial Court (R. 150), where it shows that such exception was presented and overruled by the Trial Court. As a matter of fact, merely as a matter of interest, this was assigned as error in defendant's amended motion for new trial (R. 158), and one of the points in the brief presented to the Court of Civil Appeals, which the Court of Civil Appeals did not reach.

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DECISIONS OF THE COURT OF CIVIL APPEALS AND THE SUPREME COURT OF TEXAS

Petitioner is correct in stating that we have a somewhat unusual situation here, because the opinion of the Court of Civil Appeals (R. 177 et seq.) was in favor of the defendant railroad company, and the petitioner here applied to the Supreme Court of Texas for writ of error, which was refused (R. 230). The fact that the railway company won it in the Court of Civil Appeals is unusual, but that is not what we refer to. The fact is that, although the Sureme Court of Texas did not grant a writ in the Deen case, they did, as a matter of fact, write on it in disposing of *Port Terminal Railroad Association vs. Ross*, the opinion appearing in 289 S.W.(2d) 220. This is discussed by petitioner on page 26 of their brief on the merits. The reason, of course, as petitioner shows, was that, while the Deen case was pending on motion for rehearing on the refusal of the writ, the Supreme Court of Texas had reason, in the Ross case, to indicate its specific approval of the holdings of the Court of Civil Appeals in the Deen case.

The decision of the Supreme Court of Texas with reference to the Deen case is summarized in the following quotation from *Port Terminal Railroad Association vs. Ross*, ... Tex. ....., 289 S.W.(2d) 220, quoting from page 225:

> "We agree with the Court of Civil Appeals that the verdict of the jury and the undisputed evi-

> dence establish that the railroad furnished one reasonably safe way to do the job and therefore was under no duty to furnish a second method of performing the work."

The Court of Civil Appeals gives three separate reasons for holding that the jury's verdict required entry of judgment for the defendant. The first reason was that plaintiff's pleading was that the defendant furnished neither tools or adequate help. We quote from the Court of Civil Appeals opinion (R. 181):

> "Deen pleaded that it was the company's duty to either furnish tools or additional help and the jury found that additional help was furnished and Deen was negligent in not using it."

(R. 190):

> "Deen alleged it was defendant's duty to either furnish tools or suffiicent help. His case was submitted to the jury on that theory. Deen thus assumed that if sufficient help had been furnished the babbitt could have been manually removed with safety."
>
> * * * * *
>
> "Deen alleged appellant's duty was to either furnish tools or sufficient help. He was required to prove that defendant did neither. There being a reasonably safe way to dump the babbitt without tools, appellant had no duty to furnish them for that purpose."

The second ground (R. 190) was that the evidence did not support the finding of negligence in failing to furnish tools:

> "Furthermore, there is no evidence that the additional tools suggested by Deen and Snow were in use, safe or approved. They had not thought of them (fol. 265N) before the accident. Deen testified that the clamps suggested would have been dangerous. They testified that the only way the babbitt could have been safely removed was either with their suggested appliances or manually, with adequate help. Deen testified the safest way was to tilt the pot and let the babbitt fall out. Deen and his witnesses agree that with sufficient help the pot could be tilted away from the men doing the work and the babbitt removed with safety. We sustain appellant's contention that the evidence does not support the finding that defendant was negligent in failing to furnish tools."

The last reason, of course, was that, as stated by the Supreme Court of Texas, that, whether plaintiff's pleadings bound him or not, the law was (R. 180):

> "If this contention is correct, the railway company had furnished one reasonably safe way to do the job and it had no duty to furnish a second reasonably safe way, that is, to furnish Deen with tools."
>
> * * * * *

(R. 190):

> "Under Deen's pleadings *and the law*, defendant was not required to do both. With sufficient help the babbitt could have been dumped manually with reasonable safety, therefore, there was no need, hence no duty, to also furnish tools."
> (Italics ours.)

ARGUMENT

We would like, in as concise a form as possible, to present, but not necessarily in the same order as above set out, authorities supporting the decision of the Court of Civil Appeals.

We would first like to demonstrate that the holding of the Court of Civil Appeals (which was approved by the Texas Supreme Court) to the effect that the employer, having furnished one reasonably safe way to do the work, to-wit, manually, with adequate help, had no duty to furnish an additional means, and no duty having been violated, the jury finding absolved the railroad of negligence.

We have above quoted the holding of the Court of Civil Appeals on this point, and we here quote the Supreme Court of Texas summary of that holding from *Port Terminal Railroad Association vs. Ross*, ... Tex. ....., 289 S.W.(2d) 220, quoting from page 225:

> "We agree with the Court of Civil Appeals that the verdict of the jury and the undisputed evidence establish that the railroad furnished one reasonably safe way to do the job and therefore was under no duty to furnish a second method of performing the work."

The rule announced by the Supreme Court of Texas is, of course, sound and well recognized. For general statements, we take the following from 39 *C.J.* (Master and Servant), quoting beginning at page 329:

> "[447] d. Failure to Furnish Proper and Sufficient Tools or Appliances. It is actionable neg-

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ligence on the part of a master to fail to furnish his servant with such proper tools and appliances as may be required for the reasonably safe prosecution of the work, and he cannot escape liability for failing to furnish proper safety appliances because they might have been effectual or might not have been used even if at hand. But in order to make a master liable for failure to furnish tools and appliances, *it must be shown that such tools and appliances were necessary*, and that none was at hand, although a master does not discharge his duties by having proper appliances at hand when the workmen were not allowed to use them, except by consent of their foreman. And where the lack of them arises from a temporary condition in the progress of the work caused by the negligence of fellow workmen, no liability attaches to the master. Nor is a master liable for the failure to furnish appliances to prevent an injury which could not be anticipated by the exercise or ordinary care and foresight.

"[448] 2. Nature and kind of Appliances and Places—a. In General. It is sufficient if a master furnishes his servant with reasonably safe and suitable appliances and places, and he need not furnish the most expensive, nor those of a particular kind, nor does his duty require him to provide machinery and appliances similar to those used by others, although they may be less dangerous than his own.

"[449] b. Newest, Safest, and Best Appliances and Places. *The master is not required to furnish the newest, safest, and best machinery, appliances, and places for work, but his obligations is met when he furnishes such as are reasonably safe and suitable for the purpose had in view.*

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> But in all occupations attended with great and unusual dangers, there must be used all appliances readily attainable for the prevention of accidents, and the neglect to provide such appliances is proof of culpable negligence. Under this latter rule, it is held that railroad companies are bound to avail themselves of all new inventions and improvements known to them, *whenever their utility has been thoroughly tested and demonstrated.*" (Italics ours.)

In line with the concluding portion of the above quotation, the cases in the notes to it indicate that the employer has been found negligent in using new and untested appliances and devices. 35 *Am. Jur.* (Master and Servant) contains the same language as to the general rule, and on new and novel instrumentalities, 35 *Am. Jur.*, Sec. 180, Page 609, has the following to say:

> "180. New or Novel Instrumentalities. Liability on the part of the employer is predicable of lack of care in the introduction of a novel instrumentality. Before adopting a new device, he is required to select that which seems to be the safest and most suitable for his purpose, and to consult the best available known sources of information for reliable advice as to the wisdom of the proposed experiment. A failure to take these precautions, should the device selected prove defective and an injury result from its use, will be regarded as proof of negligence."

In the Court of Civil Appeals petitioner was quite critical of the Santa Fe for using the above quotations from *Corpus Juris*, referring to it as an "old and out-

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moded work." Consequently, here we will refer to *Corpus Juris Secundum*, the volume on Master and Servant being 56 *C.J.S.*, and the statements of the rules are contained in the sections beginning with 201 on page 900. These sections of the more recent work are identical, almost word for word, with the foregoing, and we particularly refer the Court to Section 202 (the whole section), from which section we take the following quotation, (56 *C.J.S.* page 907):

> "*Momentary forgetfulness* may in an emergency excuse negligence on the part of a servant, as discussed infra § 436, but it does not create liability where the master has exercised the required degree of care for the servant's safety."

We also call particular attention to Sections 205, 206, and 207. Certainly the following quotation from Section 206 (p. 913) states the same rule as the "old" *Corpus Juris* and stated by the Texas Courts:

> "A master is not required to furnish his servant with tools, machinery, appliances, and places for work which are absolutely safe, or perfect, or most expensive, or the newest, safest and best, as discussed infra § 207, or similar to those used by others, although they may be less dangerous than his own, nor need he furnish those of a particular kind; but, broadly speaking, it is necessary for him to furnish such instrumentalities and places for work as are reasonably safe and suitable, and it is sufficient if he does so."

Without attempting to list all of the cases, or even all of the principal cases, the following decisions are certainly conclusive that, *where a jury has found* that

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the employer furnished a reasonably safe method of doing the work, he had discharged his duty to the employee under the Federal Employer's Liability Act. We list samples of the decisions by the United States Supreme Court, of various Circuit Courts, and of decisions by various State Courts, in that order:

DECISIONS OF THE SUPREME COURT:

Ellis vs. Union Pacific R. Co., 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572;

Wilkerson vs. McCarthy, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497;

Missouri-Pacific R. Co. vs. Abey, 275 U.S. 426, 48 S.Ct. 177, 72 L.Ed. 351;

Seaboard Airline vs. Horton, 233 U.S. 492, 34 S.Ct. 635, 58 L.Ed. 1062;

Hough vs. Texas Pacific RR. Co., 100 U.S. 213, 25 L.Ed. 612, 63 S.Ct. 448;

Washington & G. R. Co. vs. McDade, 135 U.S. 554, 10 S.Ct. 1044, 34 L.Ed. 235;

B. & O. R. Co. vs. Carroll, 280 U.S. 491, 50 S.Ct. 182, 74 L.Ed. 566;

Yazoo & M. V. R. Co. vs. Mullins, 249 U.S. 531, 39 S.Ct. 368, 63 L.Ed. 754;

B. & O. R. Co. vs. Groeger, 266 U.S. 521, 45 S.Ct. 169, 69 L.Ed. 419;

Chicago & N. W. R. Co. vs. Bower, 241 U.S. 470, 36 S.Ct. 624, 60 L.Ed. 1107.

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CIRCUIT COURT DECISIONS:

L. & N. R. Co. vs. Davis, (6th Cir.) 75 F.(2d) 849, Cert. den. 296 U.S. 603, 80 L.Ed. 427, 56 S.Ct. 119;

Atlantic Coast Line R. Co. vs. Dixon (5th Cir.) 189 F.(2d) 525, Cert. den. 96 L.Ed. 628, 342 U.S. 830, 96 L.Ed. 629, 72 S.Ct. 54;

Thompson vs. Penn. R. Co. (6th Cir.) 88 F. (2d) 148;

Wolfe vs. Henwood (8th Cir.) 162 F.(2d) 998, Cert. den. 332 U.S. 773, 92 L.Ed. 357, 68 S.Ct. 88;

Atlantic Coast Line R. Co. vs. Craven (4th Cir.) 185 F.(2d) 176, Cert. den. 340 U.S. 952, 95 L.Ed. 686, 71 S.Ct. 571;

Fore vs. Southern Ry. (6th Cir.) 178 F.(2d) 349;

Jackson vs. Ill. Northern R. Co. (7th Cir.) 224 F.(2d) 76;

Wadiak vs. Ill. Cent. R. Co. (7th Cir.) 208 F(2d) 925.

STATE COURT DECISIONS:

Armstrong vs. M.K.T. R. Co. (Civ.App. NRE) 233 S.W.(2d) 942;

August vs. T.&N.O. (Civ.App.-NRE) 265 S.W. (2d) 184;

Western Union Telegraph Co. vs. Coker, 146 Tex. 190, 204 S.W.(2d) 977;

Kempe vs. Illinois Central (Ia.) 232 N.W. 657;

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Truesdell vs. C. & O. Ry. Co. (Ky.) 169 S.W. 471;

Lowden vs. Bowen (Okla.) 183 Pac.(2d) 980;

Gulf, M. & N. R. Co. vs. Madden (Miss.) 200 So. 119;

Harris vs. C.N.O. & T.P. Ry. (Ky.) 197 S.W. 464;

Palmer vs. W.F. & N.W. Ry. Co. (Okla.) 159 Pac. 1115.

Petitioners place their principal reliance on *Wilkerson vs. McCarthy* (supra). In that opinion, Mr. Justice Black, for the majority, said (p. 504):

> "Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. Cf. Coray v. Southern P. R. Co. 335 US p 807, ante, 363, 69 S.Ct. 29. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances."

A little later in the opinion he says that it is up to the jury to weigh the conflicting evidence and determine whether the employer has furnished a reasonably safe way to get about his property, which would be, as applicable to the Deen case, a reasonably safe method of doing the work.

The *McCarthy* case can be distinguished on other

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grounds, of course, which are obvious from the facts themselves. However the cardinal distinction is that in the Deen case the jury made the finding that the railroad company furnished a reasonably safe way to do the work, and that petitioner was guilty of negligence in not using it. What petitioner wants the United States Supreme Court to do is to take that finding of the jury away from defendant, while admitting at the same time, as petitioner does in his brief (see p. 18), that such finding is well supported by the evidence.

> "*Since both sides accept the findings of the jury that the railway company furnished adequate help and that Deen was negligent in not using such help and this was a proximate cause of his negligence, a summary of the evidence on these points is unnecessary.*" (Italics ours.)

Does not the petitioner's admission that the jury's finding that the railroad company "furnished adequate help and that Deen was negligent in not using such help" evactly fit the requirements of Mr. Justice Douglas for a judgment in favor of the railroad in *Ellis vs. Union Pacific R. Co.* (supra). We quote from that opinion (91 L.Ed. p. 576):

> "From this evidence the jury might have concluded that petitioner had a safe place to work but elected to choose a dangerous one, that any duty of warning was fully discharged by the presence of the sign, and that the engineer had not been negligent in any way."

While, of course, petitioner has been consistent in

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claiming that he was entitled to a judgment on the jury's verdict, he has, with equal consistency, not questioned the rules of law heretofore set out.

Petitioner's primary complaint and attack on the decision of the Court of Civil Appeals is that the Court of Civil Appeals construed the findings of the jury to the effect that the defendant railway company furnished to the petitioner Deen sufficient help to do the work in reasonable safety. This holding by the Court of Civil Appeals and petitioner's attack on it are contained in the following quotation from petitioner's brief, page 15:

> "The jury did not say, and was not given an opportunity to say, that Deen was provided a safe way to do his job (R. 151-156). The Court of Civil Appeals fudged when it said:
>
> " 'We think said answers, considered in connection with the record, must be construed as a finding that sufficient men were available to help Deen remove the babbitt with safety.' (R. 181.)"

In petitioner's brief on the merits, page 4, in stating questions presented by the petitioner, they raise the same point by stating that the Court of Civil Appeals read something into the verdict that was not there. The same statement is made on page 12. On page 25 petitioner says:

> "The warping of the jury verdict by the Court of Civil Appeals of Texas in saying that it amounted to a finding that the railway company provided a safe method for Deen to do his job, was condoned by the Honorable Supreme Court of Texas."

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It is essential, therefore, we think, to demonstrate, both factually and as a matter of law, that the Court of Civil Appeals construction of the jury's finding is correct and binding on this Court.

As indicated by the foregoing quotations, the Court of Civil Appeals construed the jury's findings as being that the railroad company had furnished enough help to do the work with reasonable safety and that plaintiff was injured because of his failure to avail himself of such help.

The actual findings, which the Court of Civil Appeals had before it when it made the construction, are shown in the Court's charge (R. 115), and omitting the formal parts, we quote these issues:

> "Special Issue No. 4:
> "Do you find from a preponderance of the evidence that the Defendant failed to furnish one or more additional men to Plaintiff, other than Snow, to assist Plaintiff in removing the babbitt from the melting pot at the time and on the occasion in question
> "Answer: Yes or No.
> "Answer: No."
>
> * * * * *
>
> "Special Issue No. 7:
> "Do you find from a preponderance of the evidence that the defendant failed to give to plaintiff proper supervision at the time and on the occasion in question?
> "Answer: Yes or No.
> "Answer: No."
>
> * * * * *

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"Special Issue No. 10:
"Do you find from a preponderance of the evidence that the Plaintiff Deen was negligent in failing to obtain additional help to do the work he was doing at the time he received his injuries?
"Answer: Yes or No.
"Answer: Yes."

* * * * *

"Special Issue No. 11:
"Do you find from a preponderance of the evidence that the negligence, if any, of Plaintiff inquired about in Special Issue No. 10 was a proximate cause of his injuries?
"Answer: Yes."

The petitioner, in his brief, states many times, as he stated in the Court of Civil Appeals many times, that adding the foregoing findings together as being the equivalent of being a finding by the jury that the defendant railway company furnished adequate help to Deen to do the work involved with reasonable safety, is wrong. Petitioner nowhere has stated why it was wrong. No argument is presented, no facts are presented, and no authorities are presented.

Now, when plaintiff selected Brown County because he thought he would get a higher verdict there than in the United States District Court at San Angelo, Texas, he took both the advantages and disadvantages of the Texas practice and procedure. One of the principles of Texas practice is that the case (as any civil case) would be submitted to the jury on special issues. Some states use special findings as supplementing a general charge, and some restrict it to particular types

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or kinds of action or specific questions or matters. The practice, of course, varies from state to state, and, as far as we are aware, no state follows the same rules as Texas with reference to special issue submissions. The rules of practice and procedure in civil actions were adopted by the Supreme Court of Texas on October 29, 1940, and the sources of such rules were primarily the Texas Civil Statutes, plus the rules of decision by the appellate courts of Texas, plus an adaptation in a few instances of the federal rules, plus some original thinking by the members of the committee.

We make this statement and explanation because it must preface and excuse our discussion of the Texas practice for the submission and interpretation of special issues and special issue verdicts.

In the appendix hereto, we have copied Texas Rules of Civil Procedure Nos. 277, 279, 300 and 301. There are, of course, additional rules relating to the procedure on special issues. For example, Rule 272 provides for the submission of the proposed charge by the Court to counsel and an opportunity to object thereon, provides that "the judge shall so frame his charge as to distinctly separate questions of law from questions of fact, and not therein comment on the weight of the evidence, and so as to instruct the jury as to the law arising on the facts, and shall only submit controverted questions of fact." Rule 273 provides for the submission by the parties of special requested issues, definitions, explanatory instructions, etc. Rule 274 specifies the form for such objections and requests. Rule 275 specifies the practice with reference to read-

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ing such charge to the jury. Rule 276 covers the refusal or modification of such requested issues or instructions and the bill of exceptions in connection therewith. Rule 277 we have quoted in the appendix, and we here make only a partial quotation of it:

"RULE 277. SPECIAL ISSUES.

"In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause *upon special issues raised by the written pleadings* and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided that, if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled. Where practicable, all issues should be submitted *in the affirmative and in plain and simple language.* It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon." (Italics ours.)

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Rule 278 was repealed March 31, 1941, and was not in effect at the time this case was tried. Rule 279 is quoted in the appendix. However, we quote here the part that we think is pertinent:

> "RULE 279. SUBMISSION OF ISSUES.
>
> "When the court submits a case upon special issues, *he shall submit the controlling issues made by the written pleadings* and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. *Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue.*" (Italics ours.)

Rules 280-299, inclusive, relate other matters. For example, Rule 290 defines a verdict as being the written decision of a jury, either by general or special verdict, and "a special verdict is one wherein the jury finds the facts only on issues made up and submitted to them under the direction of the court." Rule 300 is quoted in full in the appendix hereto, but in substance provides that where a special verdict is rendered, the court shall render judgment thereon, subject to the provisions of Rule 301. Rule 301 is quoted in full in

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the appendix, and we take therefrom what we conceive to be the pertinent part thereof:

> "RULE 301. JUDGMENTS.
>
> "The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence."

Additional references will be made where they are deemed pertinent, but we think the foregoing is sufficient, plus the authorities hereafter set out, to support what we are about to present.

As is obvious from the foregoing, the written pleadings of the parties control the issues to be submitted by the court and the form of the issues. The plaintiff is thereby given the right, subject, of course, to general principles of liability law, to direct the form in which the issues will be submitted by the way and manner in which he alleges negligence on the part of the defendant employer.

In general, the plaintiff in this case based his claim, under his pleadings (R. 1 to 5), on two acts of negligence, the first claim being that the defendant furnished neither sufficient help nor proper tools to do the work in reasonable safety, and the second being that the defendant failed to furnish proper supervi-

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sion. Below we will point out that under Texas practice, plaintiff having pleaded failure to furnish either sufficient help or proper tools, he had the burden of proving and securing findings that the defendant did neither. However, here and for the purpose of this argument only, we will deal with the point as though the plaintiff had alleged (a) failure to furnish sufficient help to do the work in reasonable safety, (b) failure to furnish tools, and (c) failure to furnish proper supervision. Those are the only three things plaintiff complains about, and the plaintiff had the choice of alleging how such negligence existed, so that he would, when the case was submitted to the jury, have the issues phrased, following his pleading in such a way as he thought they would most likely be answered in his favor. Plaintiff's pleading of negligence in failing to furnish sufficient help to do the work in reasonable safety was (R. 4):

> "That had the Plaintiff had sufficient help, to-wit, at least two other persons, to assist in turning said pot over, the same could have been done by lifting the same and turning it over away from the said Plaintiff and the said Snow, but because of the negligence of the Defendant in failing to furnish sufficient help or sufficient tools to accomplish said purpose, the injuries herein set forth were received by this Plaintiff."

And again, on the same page of the record:

> "That Defendant was negligent in not furnishing at least two additional men to assist Plaintiff in removing the babbitt from said pot."

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The Trial Court, therefore, with the approval of the plaintiff, submitted the issue of whether the defendant had furnished sufficient help to do the work in reasonable safety, in substantially the wording of plaintiff's pleading, which was Special Issue No. 4 quoted above, whereby the jury found that defendant did not fail to furnish one or more additional men to the plaintiff other than Snow to assist the plaintiff in removing the babbitt from the melting pot. Under Texas practice, the only way the Court could submit the issue of whether the defendant furnished to the plaintiff adequate help to do the work with reasonable safety was Special Issue No. 4.

That the foregoing is a correct statement of the Texas rules of practice is demonstrated, we think, by the following quotations from Texas authorities. We quote first from 41-B *Tex. Jur.* Sec. 462, p. 601:

> "§462. CONFORMITY TO PLEADINGS AND EVIDENCE—IN GENERAL.—It is clear that plaintiff must recover upon the cause of action alleged in his pleadings and he must prove the truth of those allegations. Likewise, it is familiar law that defendant is confined to such defenses as are raised by the pleadings and evidence. It follows, and it is a settled principle, that the issues submitted must conform to those raised by the pleadings and evidence. In other words the pleadings and evidence determine the form of the issues and whether they are sufficiently specific or, on the other hand, too narrow."

The next quotation is from the same volume (41-B *Tex. Jur.*—Trial) Sec. 466:

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"§466. . . . NEGLIGENCE.—The special issues should be restricted to the specific acts of negligence alleged and proven, where general averments of negligence on contributory negligence are limited and controlled by various acts specified."

The Supreme Court of Texas has many times stated the rule in substantially the same language as is contained in the following quotation from *Erisman vs. Thompson*, 140 Tex. 361, 167 S.W.(2d) 731:

"(1) Under Article 2189 it is provided that the trial court 'shall submit the cause upon special issues raised by the pleadings and the evidence in the case. Such special issues shall be submitted distinctly and separately. Each issue shall be answered * * * separately.' Under Article 2190 it is provided that the trial court, when he submits a case on special issues, 'shall submit all the issues made by the pleading and the evidence.' Both articles restrict the issues to be submitted to those raised by the pleadings and the evidence. The conjunctive conjunction 'and' is used. An issue raised by the pleadings alone cannot be submitted, and likewise an issue raised by the evidence alone cannot be submitted. Under the plain language of the two statutes, before an issue can be submitted at all it must be raised by both 'the pleading and the evidence.'

"(2-4) Independent of the above statutes, pleadings determine the issues upon which parties go to trial, and it is not even proper to admit evidence unless it is addressed to or bears upon some issue raised by the pleadings. Jordan v. Meyers, 89 Tex. 233, 24 S.W. 92; Supreme Council of the American Legion of Honor v. Anderson,

61 Tex. 296. The rule further is that allegations of the pleadings and the evidence offered thereunder must conform to each other. Golden v. Odiorne, 112 Tex. 544, 249 S.W. 822. In determining issues presesnted by a pleading, we must look thereon from the standpoint of the party against whom they are exhibited. The purpose of the pleading is to put such party on notice of the character of evidence that he will be called upon to meet. Ware v. Shafer, 88 Tex. 44, 29 S.W. 756; San Antonio & A. P. R. Co. vs. Morgan, 92 Tex. 98, 46 S.W. 28, 29.

"(5-6) Under the above rules of law the plaintiff's petition defined the cause of action this defendant was called upon to meet. Defendant had the legal right to expect the allegations of the petition and the evidence offered thereunder to coincide. Under the plain language of Articles 2189 and 2190, supra, the defendant had the right to have the issues submitted to the jury so framed as to coincide not only with the evidence, and not only with the pleadings, but with both the pleadings and the evidence. *In submitting a negligence case, the special issues should be restricted to the specific acts of negligence defined by the pleadings and supported by the evidence.* Fox v. Dallas Hotel Co., 111 Tex. 461, 240 S.W. 517; Walgreen-Texas Co. v. Shivers, 137 Tex. 493, 154 S.W.2d 625; St. Louis, S. F. & T. Ry. Co. v. Wilson, Tex.Com.App., opinion approved, 279 S.W. 808; Simmonds v. St. Louis, B. & M. Ry Co., Tex. Com. App. opinion approved 29 S.W.2d 989; Kansas City, M. & O. Ry. Co. v. Perry, Tex.Com.App. 6 S.W.2d 111.

"(7) As defined by the plaintiff's petition in this case, the defendant was called upon to de-

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fend an action wherein it was alleged in plaintiff's petition that its servants, agents and employees '*intentionally*' set afire the vegetation on its right of way. Furthermore, such petition specifically pleaded how such servants, agents and employees accomplished the act of setting such vegetation afire. *This was the cause of action the defendant was called upon to meet. Plaintiff was bound by her pleadings. The defendant had the right to have Special Issue No. 6 so framed as to submit the question only of an 'intentional' setting of the fire. Furthermore, the defendant had the right to have such issue so framed as to submit the question of the setting of such fire to the way and manner pleaded by the plaintiff.*" (Italics ours.)

The above case was decided on Articles 2189 and 2190 of the Revised Civil Statutes, which were incorporated, verbatim, in the rules heretofore quoted, as will be shown by comparison of the quotation from such statute in the opinion by the Texas Supreme Court with the language of the rules above set out.

In any event, after the adoption of the Rules of Civil Procedure, the Texas Supreme Court specifically approved the above holding as applicable to the Rules of Civil Procedure. See, for example, *Phillips vs. Burns*, 151 Tex. 614, 252 S.W.(2d) 927.

As well settled as the proposition that the issues must be submitted in conformity with the pleadings of the negligence is the further proposition that under Rule 279, above quoted, the Court cannot submit different phases of the same issue. Rule 279, above quoted (and copied in the appendix), states:

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> "Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue."

This means, of course, that, having submitted to the jury the question of whether defendant failed to furnish two additional men to the plaintiff, and the further question whether the plaintiff was negligent in not availing himself of the additional help, the submission of an issue, "Do you find from a preponderance of the evidence that the defendant railway company furnished sufficient help to the plaintiff to do the work in reasonable safety?" would be merely a different phase or version of the same issue or issues, which the Court not only didn't do, but couldn't and shouldn't have done. We quote the following from Volume 41-B, *Texas Jurisprudence* (Trial—Civil Cases) Sec. 432, page 535:

> "§423. SUBMISSION OF ISSUES IN MORE THAN ONE FORM.—The court is not required to submit an issue more than once, nor to submit the same issue affirmatively in two different forms, nor to submit issues both affirmatively and negatively for the same fact question. Nor is the court required to submit various phases or different shades of the issues. One of the purposes of this rule is to shorten a charge when it can be done without prejudice to one of the parties. Whether the issue presents only another phase must be determined under the peculiar facts of each case. The court will properly refuse requested issues that have been substantially and sufficiently covered. As to a group of facts,

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it is said that if the issue submitted necessarily directs to a consideration of and requires a decision on such group of facts, then such issue submits that group of facts, and the court may properly refuse to submit the same group of facts in different language."

The foregoing, of course, is merely a condensation of many holdings of the Texas Supreme Court. See, for example:

Solgaard vs. Texas & N.O. R. Co., 149 Tex. 181, 229, S.W.(2d) 777;

Schumacher vs. Holcomb, 142 Tex. 222, 177 S.W.(2d) 951;

Little Rock Furniture Co. vs. Dunn, 148 Tex. 197, 222 S.W.(2d) 985;

Roberts Oil Corp. vs. Garrett (Commission of Appeals) 38 S.W.(2d) 135;

Thompson vs. Hodge (Civ.App.-Wr. NRE) 237 S.W.(2d) 757;

Richardson vs. Rowland (Civ.App.-Wr. NRE) 275 S.W.(2d) 184.

Now, as indicated by the foregoing authorities, since the question of whether the defendant had failed to furnish sufficient help to do the work in reasonable safety could only be submitted once and that once in the form which plaintiff chose by the formation of plaintiff's pleadings, the necessary corollary is that the jury's negative finding, that is, its answer "No" to the special issue submitted, encompasses and is the equivalent of an affirmative finding that the defendant did furnish such help. If that were not the necessary result, then there would be no way for a court,

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under the rules above set out, to keep from submitting thousands of issues of varying phases or meanings. The latest case by the Texas Supreme Court on this very point is *Driver vs. Worth Construction Co.*, 154 Tex. 66, 273 S.W.(2d) 603, in which negative answers were held to constitute an affirmative finding that the defendant did not fail to discharge the duty he owed to the plaintiff. We quote from that opinion (273 S.W.(2d), page 608):

> "In order to properly place the burden of proof within the issue the trial court submitted the issues as to adequate warnings, etc., in the negative. Special Issue No. 1 was as follows:
>
> > 'Question: Do you find and believe from a preponderance of the evidence that at the time of and immediately before the happening in question the defendant failed to have a barricade on the new concret roadway at its intersection with Merritt street sufficient to prevent the travelling public from entering upon such road? Answer "yes" or "no".'
>
> to which the jury answered 'No'. Special Issue No. 4 was answered that it was not negligence on the part of the contractor in failing to have a flagman or watchman at the Merritt Street intersection to warn the traveling public from driving on the new concrete roadway. Special Issue No. 8 asked the jury to determine from a preponderance of the evidence if 'the defendant failed to have signs at the Merritt Street intersection sufficient to give notice to the traveling public that the new concrete roadway was not open to traffic'. The jury answered 'No' to Special Issue No. 11 which inquired by appropriate language if 'the defendant failed to have flares

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at the Merritt Street intersection sufficient to give notice to the traveling public not to enter upon the new concrete roadway'.

"Thus the jury found that the contractor did not fail to discharge the duty he owed to give notice to the traveling public not to enter upon the new concrete roadway." (Italics ours.)

In our case, Deen formulated the issues on failing to furnish sufficient help to do the work in reasonable safety by his pleadings, and Deen did not object to their form. He is, therefore, in no position now to contend they do not encompass the finding, as the Court of Civil Appeals held they did, that the defendant furnished to Deen sufficient help to do the work in reasonable safety.

Now, the plaintiff has conceded (see petitioner's brief, pages 11 and 18, for example) that there was ample evidence that the railway furnished adequate help and that Deen was negligent in failing to use the available help. Petitioner's concession, on page 11, being in the following language:

"The jury found in favor of the railway on issues as to whether the railway failed to furnish adequate help, whether Deen was negligent in his failure to use available help and whether this was a proximate cause of his injuries (R. 151, 153). Both sides in this Court *concede the evidence on these issues was conflicting and cannot be disturbed by an appellate court.* (Italics ours.)

Petitioner concedes that this Court cannot disurb the jury's findings on such issue. Can, or should, this Court disurb the Court of Civil Appeals construction

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of such issues by applying the rules of Texas procedure above set out and the Texas decisions with regard to Texas practice? In the petition for certiorari in this case (see, for example, pages 23 and 24) and in petitioner's "brief on the merits" (page 25 et seq.) he has violently attacked the Texas courts, particularly the Supreme Court, claiming that in this and other cases the Supreme Court of Texas has disregarded the Federal Employers' Liability Act and the decisions of the Supreme Court of the United States.

The Supreme Court of Texas has several times stated the principles on which it handles appeals on cases tried under the Federal Employers' Liability Act (whether it is a Jones Act sailor or an F.E.L.A. railroad man). We quote from *Hopson vs. Gulf Oil Corp.*, 150 Tex. 1, 237 S.W.(2d) 352, quoting from page 358:

> "Relying on recent decision of the Supreme Court of the United States, which manifest a tendency to sustain on very little evidence verdicts of juries in suits brought under the Jones Act and under the Federal Employers' Liability Act, petitioner in effect *takes the position that the established practice in this state should be disregarded* and that judgment should be rendered here on the jury's verdict. Among other authorities petitioner cites Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916, and Wilkerson v. McCarthy, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497. But neither of those decisions nor any other that we have found is authority for departure, in a suit under the Jones Act or under the Federal Employers' Liability Act, from our settled rules of procedure. *By the institution of*

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> *his suit petitioner invoked the jurisdicition of the state courts and the suit should be tried as any other suit for damages for negligence is tried in the state courts, provided there is compliance with the specific requirements of the Federal Statutes, that is to say,* that assumed risk and negligence of fellow servants are not to be defenses and contributory negligence not a complete defense, *and that the injured seaman or employee is entitled to trial by jury.* (Italics ours.)

The same statement is contained in the later case of *Socony Vacuum Oil Co. vs. Aderhold*, 150 Tex. 292, 240 S.W.(2d) 751.

Like the Supreme Court of Texas, we know of no decision by the United States Supreme Court contrary to the rule stated by the Supreme Court of Texas. And we find nothing in *Brown vs. Western Railway of Alabama*, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100, to the contrary.

Now, however, should the United States Supreme Court desire to go into the question, as invited by the petitioner here, of whether the Texas Court of Civil Appeals and the Texas Supreme Court correctly applied Texas rules of practice and procedure to the jury's verdict in this case, we cannot see how this Court would come up with any different answer.

The Court of Civil Appeals has carefully detailed much evidence. And, as a matter of fact, we do not believe that any experienced judge or any experienced trial lawyer could read the statement of facts in this case and not know that the real fight in this case was over the question of the failure of the defendant to

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furnish sufficient help to do the work in reasonable safety. It sticks out on every page and every question. The plaintiff claimed that he didn't have enough help and it wouldn't have been furnished to him if he had asked for it, because it had been refused him on other occasions and because his helper had been taken away from him. The defendant proved that help was in the neighborhood and that he could have had it had he asked for it, and that on at least three prior occasions he had asked for it and had been furnished it to do this very work, and when he had the help it was done in safety with all feet behind the pot, and no danger to anyone.

It is true that the railroad contended that if plaintiff was going to forget and put his leg in front, where the babbitt would fall on it and where he knew the babbitt was going to fall, because that was what he was trying to accomplish, the furnishing of six men wouldn't have prevented the accident. Neither would the furnishing of tools, clamps, or whatnot. In other words, if plaintiff was going to put his leg in the place where he knew the babbitt was going to fall (whether negligently or merely because of mementary forgetfulness), he was going to get his leg broken, whether the work was done by six men, by a lifting device, or any other way. By quoting testimony out of context, the petitioner has sought to imply in this Court that the railroad company was contending in the Trial Court that plaintiff would have got his leg broken whether there were six men helping him or whether he had all the tools in the world. The defendant contended that nothing would be safe if the plaintiff put

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his foot in front of something he knew was about to fall. In other words, that the plaintiff had to exercise some care for his own safety, and if he did not, no method would have protected him. No contention was made by the defendant that the work couldn't be done with safety with adequate men.

All of the foregoing, we think, can be summarized in the following statement:

The jury found, on what petitioner admits was ample evidence, that the railroad company furnished Deen adequate help to do the work in reasonable safety.

Without getting to any question of whether Deen was bound by his pleading that the railroad company furnished neither adequate help nor proper tools, it is obvious that the Court of Civil Appeals decision was correct, because Deen got his jury trial and the jury found that the employer furnished him a reasonably safe method of doing the work, to-wit, by hand with adequate help. Having furnished Deen a reasonably safe way to do the work, it had fulfilled its duty, and having fulfilled its duty, it could not be held guilty of negligence.

Quoting from 35 *Am. Jur.* (Master and Servant) Sec. 121, p. 550:

> "It is elemental in every case involving the liability of an employer for an injury to his employee that in the absence of some special contract or statute expressly providing therefor, there can be no recovery unless the master has been negligent,—has been guilty of some breach of duty owing by him to the servant."

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Texas courts have stated the same proposition many times. For example, we quote from *Westbrook vs. Watts* (Civ.App.-NRE) 268 S.W.(2d) 694, at page 697:

> "It is an elementary principle of the law that negligence is a failure to observe a legal duty, and when no duty exists, no legal liability can arise on account of negligence."

The Supreme Court of the United States has used almost the identical language above quoted any number of times. The following cases are illustrative only:

> *Northern Pacific R. Co. vs. Adams*, 192 U.S. 440, 24 S.Ct. 408, 48 L.Ed. 513;
> *Northern R. Co. vs. Page*, 274 U.S. 65, 71 L.Ed. 929, 47 S.Ct. 491;
> *N.Y.C. R. Co. vs. White*, 243 U.S. 188, 61 L.E. 667, 37 S.Ct. 247.

Obviously, if the master's duty is to furnish a reasonably safe way to do the work, and a jury finds that the railroad company has furnished a reasonably safe way to do the work, the duty has been fulfilled, and there is no duty to furnish an additional method. Put another way, if the work could be done with reasonable safety with no tools, there was no necessity or duty to furnish tools. Quoting a portion of the quotation we have heretofore made from 39 *Corpus Juris*, Sec. 447:

> "In order to make a master liable for failure to furnish tools and appliances, it must be shown that such tools and appliances were necessary."

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What this Court has many times said is that the master must exercise ordinary care to furnish the employee with a reasonably safe place to work and a reasonably safe method to accomplish his work, and to require that its work be carried on in a reasonably safe manner. There is no decision of this Court that, *where a jury* has found that the employer furnished the employee with a reasonably safe method of accomplishing the work, the employer has an additional duty to find and furnish additional ways and methods by which the work might be done with safety.

Let us emphasize, before leaving this portion of the argument, that this is not a case, although the petitioner (see brief on the merits, pages 29 and 30) implies it is by citing *Wilkerson vs. McCarthy*, 93 L.Ed. 497, 366 U.S. 53, 69 S.Ct. 413, and *Virginia Ry. Co. vs. Viars* (4th Cir.) 193 F.(2d) 547, where the defendant furnished two ways to do the work, one safe and one unsafe. In the Wilkerson case, the employer had furnished a longer and safer route, and a short and dangerous route. The real issue in the Wilkerson case was whether the employer had adequately and consistently prohibited and prevented the use of the dangerous and shorter route. In the Wilkerson case, *there was no jury finding that the employer had furnished a reasonably safe way to do the work.* In the Viars case, there were several ways of doing the work furnished. One included dynamite, which method was found to be dangerous.

Deen was not furnished but one way to do the work, that is, manually with plenty of help. And the jury found, contrary to his evidence and his contention,

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that the railroad furnished him adequate help to do the work in safety. And therefore, the petitioner is asking this Court to hold:

> "Where the only method of doing the work provided by the employer is manual, and a jury, on adequate evidence, finds that sufficient man power was furnished by the employer to do the work in reasonable safety, the employer may nevertheless be held liable for not devising or designing some untried equipment, which might have enabled the plaintiff to perform the same job as safely as he could have done it with the help which was readily available to him."

The plaintiff has not been deprived of any jury trial. As a matter of fact, what he is asking the Supreme Court of the United States to do is to deprive the defendant railway of a jury trial by taking away from the railroad company the jury's findings that Deen was furnished a reasonably safe way to do his work.

We think the foregoing certainly should dispose of this case, without the Court getting into the Texas rules of pleadings. However, as indicated in the foregoing statement of holdings by the Court of Civil Appeals, an additional reason given by the Court of Civil Appeals was that Deen, under his pleading, having alleged that the defendant should have furnished either sufficient help or proper tools to do the work in reasonable safety, had the burden of proving that the defendant did neither. The Court of Civil Appeals said (R. 190):

> "Deen alleged it was defendant's duty to either

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> furnish tools or sufficient help. His case was submitted to the jury on that theory. Deen thus assumed that if sufficient help had been furnished, the babbitt could have been manually removed with safety."

And further (R. 190):

> "Deen alleged appellant's duty was to either furnish tools or sufficient help. He was required to prove that defendant did neither."

In the Court of Civil Appeals opinion and in the earlier portion of this prief (p. 21) we have quoted Deen's pleading showing that he alleged that the defendant should have furnished either sufficient help or proper tools to do the work with safety. Under Texas practice, he is bound by that pleading and, as the Court of Civil Appeals held he had to prove that the defendant did neither, and a jury finding that the defendant did either absolved it of liablity.

The best evidence, of course, that that is a correct rule of Texas practice is that the Court of Civil Appeals so held in this very case, and the Supreme Court of Texas refused a writ of error. In this case, the refusal of a writ of error included an express approval by the Supreme Court of the Court of Civil Appeals opinion because of the peculiar circumstances that the Supreme Court of Texas actually decided the Deen case when it wrote upon the Deen case in its decision in *Port Terminal Railroad vs. Ross*, which we have heretofore referred to (see 289 S.W.(2d) 220).

Secondary evidence of the correctness of the proposition that under Texas practice of plaintiff who

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pleads must secure a jury finding to support the pleading, and is bound by such pleading, is the quotation we have heretofore made from *Erisman vs. Thompson*, 140 Tex. 361, 167 S.W.(2d) 731, and we only repeat the concluding portion of such quotation from 167 S.W.(2d) p. 733:

> "(7) As defined by the plaintiff's petition in this case, the defendant was called upon to defend an action wherein it was alleged in plaintiff's petition that its servants, agents and employees '*intentionally*' set afire the vegetation on its right of way. Furthermore, such petition specifically pleaded how such servants, agents and employees accomplished the act of setting such vegetation afire. *This was the cause of action the defendant was called upon to meet. Plaintiff was bound by her pleadings. The defendant had the right to have Special Issue No. 6 so framed as to submit the question only of an 'intentional' setting of the fire. Furthermore, the defendant had the right to have such issue so framed as to submit the question of the setting of such fire to the way and manner pleaded by the plaintiff.*" (Italics ours.)

Additional Texas decisions (but far, far from an exhaustive list) are:

P. & S.F. Ry. vs. Ray (Civ.App.-NRE) 221 S.W.(2d) 936;
Blickman vs. Chilton (Civ.App.-No Writ) 114 S.W.(2d) 646;
Texas Employers Ins. Co. vs. Dillingham (Wr.-NRE) 262 S.W.(2d) 748;
Martin vs. Kyser (Wr. dis.) 104 S.W.(2d) 592.

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The foregoing is not an unreasonable rule of practice. The following are merely examples. A plaintiff alleges that a railroad company should have had either a wigwag or a crossing flagman at an intersection. Obviously, if the railroad company gets a jury finding that it had either a crossing flagman or a wigwag, it has secured a jury finding that it was not guilty of the negligence charged. An employer is charged with negligence in failing to furnish the employee with either a chisel or a screw driver to take the lid off a paint can. If the jury finds, on adequate evidence, that the defendant furnished the plaintiff a screw driver, the jury has found that the defendant was not negligent as charged. Plaintiff alleges that if the defendant in an automobile intersection collision had either slowed down or pulled to the right, the accident would not have happened and the defendant was negligent in failing to either pull to the right or slow down. If a jury finds that the defendant pulled to the right in plenty of time, it is a jury finding that the defendant was not guilty of the negligence charged. The foregoing are all actual cases, and they can be multiplied indefinitely.

It may be that this Court prefers the trial of cases under the Federal Rules of Civil Procedure. It may be that the plaintiff, had he chosen to file this suit in the United States District Court where it would have been tried on a general charge, might have won it. But the plaintiff in this case elected his home county and the state court, and with no belligerence intended, certainly Congress has not enacted any statute which makes the Federal Rules of Civil Procedure the gov-

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erning principles for the trial of an F.E.L.A. case in the District Court of Brown County, Texas. We do not understand that any decision of this Court has so indicated.

No matter whether this Court approve or not approve of the Texas practice, no one can say that the plaintiff in this case was deprived of a jury trial by reason of the Texas practice. Plaintiff got his jury trial, and the jury brought in a verdict. The most plaintiff can say, and the most this Court can say, is that the Texas Court of Civil Appeals erred in applying principles of Texas practice to a trial before a Texas jury and to the special issues verdict that a Texas jury returned.

We do not think we ever get to the question of whether the Court is going to decide the case on a principle of Texas pleading and practice. Because unquestionably the plaintiff had a jury trial, and unquestionably the jury found that the defendant furnished him a reasonably safe way to do the work. Put another way, the jury found that the only method furnished by the defendant to do the work was reasonably safe. And that, of course, was a full discharge of the defendant's duty and obligation to the plaintiff, and absolved the defendant of negligence.

However, if this Court wants to go into the matter of Texas practice, then we next come to Texas Rules of Civil Procedure 301, which is copied in full in the appendix.

The pertinent portion of such rule (which is merely

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Article 2211 of the Revised Civil Statutes of Texas carried forward verbatim) is as follows:

> "RULE 301. JUDGMENTS.
>
> "The judgment of the court *shall conform to the pleadings, the nature of the case proved and the verdict,* if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity." (Italics ours.)

Under the above rule, the Trial Court had the obligation of rendering such judgment as conformed to the pleadings, the case proved, and the verdict. The judgment could not conform to only the case proved, nor could it conform only to the verdict. The judgment had to conform to all three. The error in this case by the Trial Court was failing to properly apply Rule 301 to the pleadings, to the proof, and to the jury's verdict. That was why the case was appealed to the Court of Civil Appeals and why the Court of Civil Appeals reversed it.

Under the foregoing rule (and the statute which preceded it and contained the same language), the Trial Court, or on appeal the Appellate Court, must disregard, as immaterial, findings of the jury which are not supported by *both* the pleadings and the evidence, or which are immaterial as a matter of law. Again, the following citations, since we anticipate the petitioner can furnish none to the contrary, are illustrative rather than an exhaustive list of the authorities which might be presented:

> *Sawyer vs. City of San Antonio,* 149 Tex. 408, 234 S.W.(2d) 398;

Starr vs. Ferguson, 140 Tex. 80, 166 S.W.(2d) 130;

Whittenburg vs. Miller, 139 Tex. 586, 164 S.W. (2d) 497;

Sproles vs. Rosen, 126 Tex. 51, 84 S.W.(2d) 1001;

Rich vs. Western Union Tel. Co., 101 Tex. 466, 108 S.W. 1152;

Hargrove vs. Trinity Universal Ins. Co., 152 Tex. 243, 256 S.W.(2d) 73.

We think the following quotation from 41-B *Tex. Jur.* (Trial—Civil Cases) Sec. 591, page 819, correctly states the rule in Texas:

> "§591. IMMATERIAL AND IRRELEVANT FINDINGS.—A verdict based on an authorized submission is necessarily comprehended by the rule that the judgment must conform to the pleadings, the nature of the case proved, and the verdict of the jury,—a rule which is completely covered in another article. While it is said that the judge has no power to override the verdict and to render a judgment contrary thereto upon any issue in the case, this rule does not apply where the issues on questions of law should not be submitted, but, if submitted, the answers of the jury thereto may be disregarded by the trial court. And if a special issue is erroneously submitted, the jury's answer should be ignored by the court. If, by ignoring the answers to immaterial issues and considering answers to material issues, the court can render a judgment on the material issues answered, such judgment is not rendered non obstante veredicto."

Rule 301, as quoted in full in the appendix, also

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provides for motions to disregard any issues which are immaterial or which are not supported by the evidence. Such motion, of course, was made in this case in the Trial Court and was sustained by the Court of Civil Appeals. For a statement of a synopsis of the Texas decisions on the same, we quote from 41-B *Tex. Jur.* (Trial—Civil Cases) Sec. 592, page 821:

> "Findings upon issues as to which there is no evidence and upon issues established by the un-uncontroverted evidence are not required to be embraced in the veredict. Independently of the rule, *the court is authorized to ignore a finding* that has no support in the pleading or evidence, or a finding *which, in view of findings on other issues, is immaterial.* If there is no dispute, no issuable fact is presented. But, the question being submitted to, and erroneously found by, the jury against undisputed evidence, the court is authorized to ignore the finding and render judgment according to the undisputed evidence." (Italics ours.)

A few of the decisions applying the foregoing rules are:

Texas and N. O. R. Co. vs. Blake (Civ.App.-Wr.ref.) 175 S.W.(2d) 683;

Reddick vs. Longacre (Civ.App.-Wr.ref) 222 S.W.(2d) 399;

Miller vs. Lemm (Commission of Appeals) 276 S.W. 211;

Clock vs. Dowd (Commission of Appeals) 280 S.W. 194;

Johnson Aircraft vs. Wilburn (Civ.App.-No Writ) 190 S.W. 426.

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Repeating then, the Trial Court had the duty of entering judgment in accordance with the pleadings, the evidence, and the jury's findings to the special issues. On appeal, the Court of Civil Appeals, of course, has the right to review the correctness of a Trial Court's judgment, and if the Trial Court did not enter the proper judgment based on the pleadings, the evidence, and the jury's verdict, the Court of Civil Appeals has the duty and obligation of reversing and rendering the correct judgment. That is what was done in this case, and that is what the petitioner has appealed to the Supreme Court of the United States for relief against. We suppose petitioner is asking this Court to review the correctness of the decision of the Court of Civil Appeals in construing the pleadings, the evidence, and the jury's findings, and to substitute its construction of the Texas pleading, the Texas evidence, the Texas special issue verdict, and enter such judgment as it deems required under Rule 301. If this Honorable Court applies the Texas rules of practice and procedure and follows the Texas decisions thereon with reference to practice and procedure, it will affirm the Court of Civil Appeals judgment in this case.

Lastly, the Court of Civil Appeals judgment was correct, disregarding all of the matters heretofore presented, because the evidence was insufficient to support a finding of negligence in failing to furnish the "I" clamps or "C" clamps which plaintiff invented on the witness stand.

We only reach this point after the Supreme Court of the United States has held that the employer must

furnish several safe ways to do the work. After the Supreme Court has held that, where a jury has found that the employer furnished a reasonably safe way of doing the work and the employee negligently failed to use that method, the employer can still be held liable if there was another way of doing the work which the employer did not furnish but under which the work might have been done at least as safely as the method which the employer did furnish.

The Supreme Court of the United States only reaches this point, after it decides that the case tried in a Texas District Court is not governed or controlled by Texas rules of procedure relating to pleading, jury findings, etc.

Since it is almost inconceivable that this Court is going to hold that the employer has to furnish several safe ways to do the same job, and hold that a plaintiff who selects a Texas court to try his F.E.L.A. case in is to have the benefit of the Federal Rules of Procedure or otherwise not be bound by the rules of practice of that court, we are not going to elaborate extensively on the lack of evidence. The Court of Civil Appeals has set out, and we will here pick the essence of it in four short quotations. The only tools the absence of which plaintiff complains, was failure to design some type of "C" clamp or "I" clamp, and this is the way the plaintiff's testimony reads (R. 70):

> "Q. Now with reference to the equipment and tools which you had available out there, in the shop at the time and on the occasion in question, was there any other type of tool or equipment,

other than what was made available to you that could have done this job?

"A. Yes sir. I think *I could have designed within a period of a short time*, designed several tools that would do the job, even by myself.

"Q. What particular tool or equipment could have been furnished you that was not furnished you at the time and on the occasion in question?

"A. Well, right on the spur of the moment a person could have taken two C clamps with a chain attached to both, clamping them both on the same side of the pot, at each end, using a chain hoist to hook into the chain in a loop, lifting the pot up gently on its side—of course it would have balanced straight up; but you could have been on the back side of it and one end would have tilted it away from you very easily, and lowered it very slowly with the other hand. The hoist is a heavy enough hoist that you could lift much more load than that with one finger, if you could hook the finger in the chain link; but it operates very easy under that amount of load; and by tilting the pot away from you, if the babbitt falls out, or the pot fell over, it would fall on the floor and not on you." (Italics ours.)

Also quoting from Deen's testimony (R. 77):

"Q. Mr. Deen, these seat clamps you are talking about, have you—or did you ever use them these other times when you removed the pot?

"A. No, sir.

"Q. Did you ever discuss the need for them with Williams or Johnson to remove this pot?

"A. No, sir.

"Q. As a matter of fact, that is just some

theory of yours that you have developed recently isn't it. Mr. Deen?

"A. No, sir.

"Q. Well, when I took your deposition, I asked you if there was any kind of a device that would handle that, and you told me not that you knew of; didn't you?

"A. I didn't tell you that I couldn't have figured out one if I had had to figure out one.

"Q. All right, did you tell me if you tried to clamp on to it, it would be dangerous, and might bust that cast iron and damage or injure somebody?

"A. It is possible, but not probable."

Again quoting Deen (R. 78):

"Q. Question 191: You know of no device that would hold it? Answer: 'We had things to lift so it could not turn or roll, that is, so long as your hoist stuck so that you can get it turned over and get the babbitt out, but you are likely to throw a piece of cast iron through it; it is dangerous.' Did you answer that?

"A. Yes, sir.

"Q. Is that true?

"A. Yes, sir."

Again quoting from Deen's testimony (R. 82):

"Q. When I asked you about designing something, all that you could think of was the clamps and that would be dangerous, wasn't that your testimony?

"A. Yes, sir."

Petitioner cannot add all of the testimony with reference to "C" clamps, seat clamps, or "I" clamps together and add it up to amount to more than plaintiff's invention on the witness stand of a theory or method, which might or might not work, and which he admitted was likely to be dangerous. There is no evidence that it would work. The system was invented on the witness stand, and no one had ever tried it out. No court would be quicker to condemn a railroad company for using a method or equipment which was untried and untested than the United States Supreme Court. Even if there were no evidence that such method was dangerous, this Court would have held the Gulf, Colorado and Santa Fe Railway Company guilty of negligence for using an untested means or method.

Of course, that has always been a sound principle of law, to-wit, that the master is negligent if he uses a novel method or novel instrumentality without testing it or determining whether it would or would not work. We quote from 35 *Am. Jur.*, Sec. 180, p. 609:

> "180. New or Novel Instrumentalities. Liability on the part of the employer is predicable of lack of care in the introduction of a novel instrumentality. Before adopting a new device, he is required to select that which seems to be the safest and most suitable for his purpose, and to consult the best available known sources of information for reliable advice as to the wisdom of the proposed experiment. A failure to take these precautions, should the device selected prove defective and injury result from its use, will be regarded as proof of negligence."

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Or, as it is put in 56 *C.J.S.*, Sec. 208, p. 916:

> "An employer before adopting and installing a new and untried appliance is required to select that which seems to be the safest and most suitable for his purpose, and to consult the best available known sources of information for reliable advice as to the wisdom of the proposed experiment."

Turning the same proposition around and stating it the other way, the master cannot be held negligent for failing to use a different method if the prior method was reasonably safe. Or, as it is stated in 56 *C.J.S.*, Sec. 226, p. 952:

> "The carrier is not required to furnish the latest, best, and safest appliances, or to discard standard appliances, reasonably safe and suitable or efficient, on the discovery of later improvements."

Another statement of the same proposition, which seemed peculiarly applicable in view of the untested and probably dangerous character of the suggested method, is taken from 65 *C.J.S.*, Sec. 2, p. 330:

> "i. POSSIBILITY OF SAFER METHOD.
>
> "*The fact that there may have been a safer method than that employed, or that danger might have been avoided by action in a different manner, does not make an act negligent.*
>
> "If one has acted with ordinary prudence and judgment, he is not negligent even though danger might have been avoided, if he had acted in a different manner, and, hence, the doing of an act in a certain manner is not necessarily negligent merely because there may have been a safer man-

> ner of doing it. A fortiori, in the absence of a fixed duty, negligence cannot be inferred from failure to do an act in some other way not shown to be safer than the way in which it was done, and, when prudent men differ as to which of two courses is safer, negligence cannot be predicated on the adoption of either."

Now, we have in this case, in addition to the fact that the plaintiff invented them from the witness stand and didn't know whether it would work or not work, the fact that he testified at least three times that such method could be dangerous. Of course, as he points out, the pot is cast iron, and when you clamp onto cast iron and lift, the probabilities are that the cast iron will fracture and the piece pull out or be thrown out. No matter how dangerous plaintiff says it was when he testified, his attorneys now say that the railroad company was guilty of negligence in failing to furnish him an untested and untried clamp, which evidence shows very probably would have been dangerous.

The only real argument which petitioner asserts to support such an absurd proposition is, "The railway company's silence materially strengthens the probative force of the evidence offered by Deen," (petitioner's brief, p. 20). Of course, it is true that there are cases which hold that the failure of a defendant, in presenting its evidence, to controvert statements or assertions of plaintiff's witnesses adds some weight to the testimony of such witnesses. These, however, are all cases where the defendant actually puts on evidence. In the case at bar, the defendant put on no evidence

whatsoever, and rested when the plaintiff did. Under such circumstances, no presumption exists, and appellee's authorities are inapplicable. We quote from 22 *C.J.*, Sec. 56, p. 120:

> "Where a party calls no witness, but submits his case in reliance upon the insufficiency of his adversary's evidence no unfavorable inference arises from his failure to call witnesses having special knowledge."

The above rule was applied by the Texas Supreme Court in the case of *T. & P. Railway Company vs. Shoemaker*, 98 Tex. 451. See page 456. See also, *G. H. & S. vs. Landeros*, (Civ. App.), 264 S.W. 524, and *Turner vs. Texas Company* (Texas Sup. Ct.) 159 S.W.(2d) 112.

The most that can be said, under any circumstances, is that the defendant had furnished one reasonably safe method to do the work, to-wit, manually with plenty of help. Now, with that being established by the jury's finding, does the plaintiff, in the face of that finding, raise an issue of fact on the defendant's negligence by testifying that another method might have been designed which might work and which might be safe or might be dangerous?

Therefore, we say, even if the Supreme Court of the United States were to hold that every point here presented and every point on which the Court of Civil Appeals based its decision was wrong, nevertheless, under the plaintiff's own evidence in this case, there was no issue of negligence to be submitted to the jury except the failure to furnish supervision and the fail-

ure to furnish him sufficient help. Those two were submitted to the jury and were answered against him.

Let us repeat again, there is no issue before this Court but that the evidence justified the submission of the negligence on the part of the employer in failing to furnish sufficient help to do the work in safety. There is no issue before this Court but that the evidence justified the submission to the jury of the issue of whether the employer failed to furnish proper supervision. Both of those issues were submitted to the jury and found in favor of the defendant. The defendant furnished adequate help to do the work in safety, and the defendant furnished adequate supervision. Now, in the light of those findings, and the evidence supports each of them, as petitioner admits, can this Court say that there was evidence to support a finding of negligence in failing to furnish an untested, untried and unsafe tool or appliance?

SUMMARY

We would like to summarize this whole case again by referring to petitioner's fundamental proposition. On page 3 of petitioner's brief on the merits, he states that the only question presented is whether the Court of Civil Appeals in this case, in construing the pleadings, the evidence, and the jury finding as requiring a judgment for the defendant "has deprived the injured employee of the right of trial by jury given him by the Congress under a Federal Statute generally known as the Federal Employers' Liability Act."

We summarize our answer to that by stating again

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that the plaintiff in this case had a jury trial. He had a jury trial in the District Court of Brown County, Texas. He selected that court, and he had that trial under Texas form of pleadings, as he wanted it. He had it under Texas rules of evidence, as he wanted it. He had a trial according to the Texas rules of civil procedure, and that meant special issues, and that was the way he wanted it. He had a jury trial, and under Texas practice he tried it on special issues. The jury found the essential issues of fact against him, and the Court of Civil Appeals so held.

Nobody has deprived the plaintiff of a jury trial. What the plaintiff in this case wants the United States Supreme Court to do is to deprive the defendant railway company of a jury verdict in its favor.

In attempting to obscure the proposition that the Supreme Court of the United States is asked to take a jury verdict away from the defendant, the petitioner has (see petitioner's brief on the merits, p. 33) made a vicious attack on the Supreme Court of Texas and demanded that the United States Supreme Court chastise the Supreme Court of Texas for exercising the jurisdiction given to it by the Constitution of the State of Texas. That is not what is involved here. What is involved here is a plaintiff who was willing to tell the truth about how he got hurt, and he lost his law suit before a jury. Now, the petitioner does not contend in so many words that the Federal Employers' Liability Act guarantees that a plaintiff will recover, but that is what he is asking this Court to hold, no matter what the jury found.

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CONCLUSION

It is the prayer of the respondent, Gulf, Colorado and Santa Fe Railway Company, that this Court, on further consideration, dismiss certiorari as having been improvidently granted; or in the alternative that the judgment of the Court of Civil Appeals be in all things affirmed, or in the event that there is any portion of the opinion or decision or judgment of the Court of Civil Appeals which this Court does not approve, that all matters presented to the Court of Civil Appeals be considered in this Court, and all assignments of error there presented be thoroughly considered and decided.

Respectively submitted,

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I certify that a copy of this brief has been mailed on the ..... day of February, 1957, to petitioner's attorneys, David C. McCord, 519 Mercantile Bank Building, Dallas 1, Texas, and to Robert Lee Guthrie, 1608 Mercantile Bank Building, Dallas 1, Texas.

APPENDIX

RULE 277. SPECIAL ISSUES.

In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided that, if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled. Where practicable, all issues should be submitted in the affirmative and in plain and simple language. It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon. In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge. If the nature of the suit is such that it cannot be

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determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this rule shall be construed in connection with the succeeding rule. Amended by order of March 31, 1941.

RULE 279. SUBMISSION OF ISSUES.

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be demed a ground for reversal of the judgment unless a substantially correct

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definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

RULE 300. COURT TO RENDER JUDGMENT

Where a special verdict is rendered, or the conclusions of fact found by the judge are separately stated the court shall render judgment thereon unless set aside or a new trial is granted, or judgment is rendered notwithstanding verdict or jury finding under these rules.

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RULE 301. JUDGMENTS

The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

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